IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,

and

ASSOCIATION OF AMERICAN RAILROADS, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NELSON J. COONEY
KENNETH E. SIEGEL
1616 P Street, N.W.
Washington, D.C. 20036
(202) 797-5347
Attorneys for
American Trucking
Associations, Inc., *et al.*

GEORGE KAUFMANN
(Counsel of Record)
ROBERT J. HIGGINS
JOAN M. DARBY
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Attorneys for
International Brotherhood of
Teamsters

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

82PP

TABLE OF CONTENTS

	Page
Appendix A—Opinion of the Interstate Commerce Commission in Ex Parte No. MC-156	1a
Appendix B—Opinion of the United States Court of Appeals for the Fifth Circuit in *American Trucking Assns., Inc., et al.* v. *Interstate Commerce Commission, et al.* (Jan. 20, 1984)	29a
Appendix C—Judgment of United States Court of Appeals for the Fifth Circuit in *American Trucking Assns., Inc., et al.* v. *Interstate Commerce Commission, et al.*	49a
Appendix D—Decision of the Interstate Commerce Commission in No. MC-78786 (Sub./No. 281)-F	51a
Appendix E—Opinion of the United States Court of Appeals for the Fifth Circuit in *American Trucking Assns., Inc., et al.* v. *Interstate Commerce Commission, et al.* (July 29, 1982)	59a
Appendix F—Statutory provisions involved	71a

APPENDIX A

Served January 6, 1983

M-13230

INTERSTATE COMMERCE COMMISSION

Ex Parte No. MC-156

APPLICATIONS FOR MOTOR CARRIER OPERATING AUTHORITY BY RAILROADS AND RAIL AFFILIATES

Decided December 17, 1982

The Commission is eliminating the "special circumstances" doctrine to make it easier for railroads and rail affiliates to obtain unrestricted motor carrier authority. This action is mandated by changes in the transportation industry since the passage of the 1935 Motor Carrier Act and recent revisions to the Interstate Commerce Act reducing entry requirements for obtaining motor carrier authority, requiring less restricted motor carrier operations, and encouraging intermodal transportation and competition between and among rail and motor carriers.

DECISION

BY THE COMMISSION:

This proceeding was instituted by a notice of proposed policy statement, served October 9, 1981, and published at 46 F.R. 50,423 (October 13, 1981). The notice sought public comment on the continued viability of the "special

circumstances" doctrine in light of recent amendments to the Interstate Commerce Act embodied in the Motor Carrier Act of 1980 (MCA), Public Law 96-296, and the Staggers Rail Act of 1980 (Staggers Act), Public Law 96-448. The "special circumstances" doctrine requires the restriction to incidental rail service of motor carrier operating authority issued to railroads or rail affiliates in licensing proceedings unless special circumstances are shown that unrestricted authority is required to fulfill a compelling public need for service not being offered by independent motor carriers. The aim of the doctrine is to prevent rail domination of motor carrier markets.

Comments were received from shippers, freight forwarders, motor carrier and rail carrier interests, and the United States Department of Transportation (DOT).[1] In general, railroads, rail-affiliated motor carriers, and DOT favor abolition of the doctrine, contending that it has outlived its usefulness in light of the comparable economic positions of today's rail and truck industries and the recent amendments to the Interstate Commerce Act which encourage competition. Shippers, freight forwarders, and independent motor carriers argue for retention of the "special circumstances" doctrine, citing its salutary effects on rail-motor competition and the continuing statutory basis for the doctrine's application.

---

[1] Parties filing comments include Grain Processing Corporation; Monsanto Company; Air Cargo Terminals, Inc. and Armellini Express Lines, Inc.; The American Trucking Associations, Inc. (ATA); The Regular Common Carrier Conference of the ATA; Central Freight Lines Inc.; Garrett Freight Lines; The Association of American Railroads; The Santa Fe Trail Transportation Company; The Family Lines Rail System and Seacoast Transportation Company, Inc.; Consolidated Rail Corporation and Pennsylvania Truck Lines, Inc.; Kansas City Southern Railway Company and Louisiana & Arkansas Railway Company; The Milwaukee Motor Transportation Company; Sanderville Railroad Company and B-II Transfer Co.; The Western Pacific Railroad Company; and Union Pacific Railroad Company and Union Pacific Motor Freight Company.

After careful analysis of the record in this proceeding, we conclude in this final policy statement that the "special circumstances" doctrine should be eliminated from motor carrier licensing proceedings. Given the explicit directives of the revised act for eased motor carrier entry requirements, broad, less restricted motor operating authority, intermodal promotion, and minimized regulation of railroads, special or unusual circumstances are no longer required to be shown in support of unrestricted motor carrier licensing applications by railroads and rail affiliates.

The "special circumstances" doctrine is not a viable policy under the newly revised Interstate Commerce Act

Recent amendments to the motor carrier provisions of the Interstate Commerce Act embodied in the MCA have established "a new Federal policy which is designed to promote a competitive and efficient motor carrier industry." H.R. Rept. 1069, 96th Cong., 2d sess. 14 (1980). At the heart of this legislation is the mandate for eased regulatory entry requirements offering "increased opportunities for new carriers to get into the trucking business and for existing carriers to expand their services." *Id.* at p. 3. The new licensing provisions at 49 U.S.C. 10922 and 10923 markedly reduce the burden of proof of those seeking motor carrier authority and substantially increase the burden of proof of those opposing the issuance of motor carrier authority. New section 10922(h) requires the removal of inefficient restrictions on motor carrier authority.

The Staggers Rail Act of 1980 endorses more competitive, less restricted rail operations and stresses minimized federal control over the rail transportation system. The Staggers Act, has established a new rail transportation policy which evidences Congress' intent "to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers

and other modes." 49 U.S.C. 10101(a)(5). In passing the Staggers Act, Congress found that "today most transportation is competitive and many Government regulations affecting railroads have become unnecessary and inefficient." H.R. Rept. 1430, 96th Cong., 2d sess. 79 (1980). Congress also emphasized that "[m]odernization of economic regulation of railroads, with greater reliance on the marketplace is essential to achieve maximum utilization of railroads, to save energy and combat inflation." *Id.*

The "special circumstances" doctrine has its origins in the earliest days of the Commission's regulation of motor carriers. The underlying policy against granting unrestricted motor carrier operating authority to railroads or their affiliates originated in the motor-rail acquisition and control section 213(a)(1) of the Interstate Commerce Act as amended by the Motor Carrier Act of 1935. This legislation prohibited a railroad from acquiring or merging with a motor carrier "unless * * * the transaction * * * [would] promote the public interest by enabling the [rail] carrier * * * to use service by motor vehicle to public advantage in its operations and not unduly restrain competition." Pursuant to this statutory language, the Commission restricted motor operations resulting from rail-motor acquisitions proceedings to those auxiliary or supplemental to rail service. See *Pennsylvania Truck Lines, Inc.—Control—Barker*, 1 M.C.C. 101 (1936). The rationale for this policy was to protect the nascent motor carrier industry from anticompetitive control by the more mature railroads with their dominant size and great financial resources. *Id.* at p. 112.

Although there was no express statutory requirement for doing so, this principle was extended to motor carrier licensing proceedings under sections 207 and 209 of the act. See *Kansas City S. Transport Co., Inc., Com. Car. Application*, 10 M.C.C. 221, 240-41 (1938) (The Commission found that the motor carrier applicant's affilia-

tion with a railroad required imposition of specific auxiliary-to-rail restrictions).[2] The basis for this was both the Commission's interpretation of the acquisition section 213(a)(1), and the requirements of the Declaration of Policy of the Motor Carrier Act of 1935, which provided that the Commission was—

> to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical,

---

[2] Typically, all or some of the following restrictions have been imposed in rail-motor acquisition an licensing cases:

1. Service performed by the rail-affiliated motor carrier should remain auxiliary to or supplemental of rail service meaning in part that shipments must be consigned on a rail carrier bill of lading at rail carrier rates.

2. Service could not be rendered to or from any point not on the rail line of the railroad.

3. Service could not be performed between or through any large termini on the rail line. This restriction is commonly referred to as the "key point" restriction, and in effect prevented the motor carrier from participating independently in most major traffic flows.

4. The motor carrier might be limited to handling only freight which had a prior or subsequent movement on the rail line.

5. Contractual agreements between the railroad and the motor carrier had to be reported to the Commission and were subject to Commission modification.

6. The Commission retained the right to impose further conditions necessary to insure that service remained auxiliary or supplemental to rail service.

This practice received Supreme Court approval in *I.C.C.* v. *Parker*, 326 U.S. 60, rehearing denied 326 U.S. 603 (1945). In *United States* v. *Rock Island Transit Co.*, 340 U.S. 419, rehearing denied, 341 U.S. 906 (1951), the Court upheld the Commission's power to modify these restrictions.

> and efficient service by motor carriers, * * * improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers * * *.

The "special circumstances" doctrine itself was a departure from the strict requirement of imposing auxiliary-to-rail restrictions on motor carrier authority issued to railroads or rail affiliates in licensing proceedings. The doctrine allowed issuance of unrestricted authority where the rail-affiliated applicant could show a "compelling need" for its service by demonstrating (1) that a grant of unrestricted authority would not result in undue restraint of competition, and (2) that the public interest requires the proposed operation which was not being furnished by independent motor carriers. See *e.g.*, *Rock Island M. Transit Co.—Purchase—White Line M. Frt.*, 40 M.C.C. 457 (1946).

This evidentiary requirement has been imposed in addition to a rail-affiliated applicant's burden of proving a public need for proposed motor common carrier service under former section 207 and present section 10922, and motor contract carrier service under former section 209 and present section 10923 of the act.

The extraordinary licensing and operational restrictions on rail-affiliated motor carriage embodied in the "special circumstances" doctrine are the product of past policies which stressed limited competition and regulatory protection as the proper methods of preserving the "inherent advantages of motor carriage." The "special circumstances" doctrine and its underlying policies are incompatible with the regulatory scheme now mandated by Congress under the revised Interstate Commerce Act. The application of the "special circumstances" policy proves this point. The "compelling necessity" standard of proof generally applied in "special circumstances" proceedings is at odds with the mandate of the revised

act for eased motor carrier entry requirements and increased competition. The fact that there may be independent motor carriers which are authorized to perform a service cannot preclude or inhibit authorization of a new, competitive service. The presumption against motor carrier competition, including rail-related motor carrier competition which underlies the "special circumstances" doctrine as it is presently constituted, has been reversed by the act's new licensing policies. The maintenance of the presumption would still be required if the burden of proof were shifted in "special circumstances" from rail applicants to those opposing their applications, as has been suggested by some commenting parties in this proceeding. However, the extraordinary barriers maintained by a "special circumstances"-type doctrine are inapposite to the procompetitive policies of the new licensing provisions of the revised Interstate Commerce Act. Therefore, these barriers must be removed.

Under the Interstate Commerce Act, as amended by the MCA, an applicant for motor carrier authority (including a rail-affiliated motor carrier) must demonstrate that it is fit, willing, and able to perform the proposed service, and that the service will serve a useful public purpose, responsive to a public demand or need. 49 U.S.C. 10922(b)(1). A person protesting the issuance of a certificate must then demonstrate that "the transportation to be authorized by the certificate is inconsistent with the public convenience and necessity," *Id.* However, diversion of traffic from an existing carrier is not in and of itself inconsistent with the public convenience and necessity. 49 U.S.C. 10922(b)(2)(B). The existence of other motor carriers authorized to perform the service is insufficient to demonstrate inconsistency with the public convenience and necessity. The showing required under the "special circumstances" doctrine of compelling necessity for unrestricted authority for rail-affiliated motor carriers has no place in the procompetitive

licensing regulations of the revised Interstate Commerce Act.

Moreover, the relative economic positions of today's truck and rail industries as well as the ability of motor carriage to compete successfully with other forms of transportation undercuts the basic protective rationale for the "special circumstances" doctrine. This is emphasized in the legislative histories of the MCA and the Staggers Act as a basis for the passage of this legislation. The motor carrier industry as a whole generates about 75 percent of the revenues earned by all forms of transportation. See H.R. Rept. 1069, *supra*, at p. 2. Over the years the railroads have handled a continuously declining share of available traffic. Today, the once dominant railroad industry accounts for only 36 percent of the intercity ton-miles of freight. See H.R. Rept. 1035, 96th Cong., 2d sess. 35 (1980). Moreover, earnings by the railroad industry are the lowest of any transportation mode and are insufficient to generate funds for necessary capital improvements. See H.R. Rept. 1430, 96th Cong., 2d sess. 79 (1980). Clearly, motor carriers compete successfully with rail carriers, and the Commission's regulation under the amended Interstate Commerce Act must reflect this fact.

Additionally, both Congress and the Commission increasingly have endorsed rail-motor competition through policies of rail rate flexibility. Section 205 of the Railroad Revitalization and Reform Act of 1976 (now substantively codified at 49 U.S.C. 10704(a)(2)) encouraged intermodal competition by mandating that no rate of a common carrier by railroad shall be held up to a particular level to protect the traffic of any other carrier or mode of transportation unless the Commission finds that such rate reduces or would reduce the going concern value of the carrier charging the rate. In *Cost Standards for Railroad Rates*, 362 I.C.C. 800 (1980), pursuant to the directives of the 4R Act, the Commission

established a presumption of minimum rate reasonableness at a modest, cost-related level which required that a rate need only cover the "directly variable cost of providing transportation" (i.e., line-haul cost of the lading, applicable switching costs, and station clerical costs) in order to be deemed to contribute to the going concern value of the carrier. In addressing arguments of possible predatory pricing under its liberal policy of minimum rate reasonableness, the Commission stated that—

> the economic structure of motor and water carriers is such that they are not truly susceptible to predatory pricing practices. Even if driven out of a market temporarily, by a railroad rate reduction, they can always reenter quickly if the railroad raises its rates again. Thus, while a railroad rate reduction can divert traffic from other modes, it cannot eliminate those modes as competitive influences. In conclusion we believe that truly predatory or destructive pricing practices are unlikely as between the railroads and their intermodal competitors. *Id.* at p. 825.

In a continuation of the proceeding in *Cost Standards for Railroad Rates*, 364 I.C.C. 898 (1981), the Commission implemented the new statutory minimum rate standard of section 201 of the Staggers Act (49 U.S.C. 10701a (c)(2)) and concluded that when a rate covers the "directly variable cost of providing the transportation" the rate is *conclusively* presumed to contribute to the going concern value of the carrier and therefore is reasonable. In changing the liberal presumption of minimum rate reasonableness under the 4R Act into an even more liberal conclusive presumption under the Staggers Act the Commission found that—

> The objective of the minimum rate provisions of 49 U.S.C. 10701a is to accord rail carriers maximum

> flexibility to lower rates in order to meet competition and otherwise attract traffic. *Id.* at p. 905.

We are convinced that Congress' mandate for increased intermodal competition through relaxed motor licensing and rail rate flexibility policies require the elimination of the "special circumstances" doctrine as a barrier to rail-motor competition.

Several parties argue that we may not modify the "special circumstances" doctrine because the Supreme Court has affirmed the policy in *American Trucking Assns.* v. *United States*, 355 U.S. 141 (1957) and *American Trucking Assns.* v. *United States*, 364 U.S. 1 (1960). However, these decisions do not require the maintenance of the "special circumstances" doctrine. First, in neither of those decisions did the Supreme Court find that there was an absolute statutory prohibition. While the Court affirmed the Commission's policy of applying the provisions of 49 U.S.C. 11344(c) to an operating rights application under 49 U.S.C. 10922 and 10923, it also noted that this policy was not rigid and that occasional unrestricted licenses were not beyond the statutory framework then in existence. In the second *American Trucking Associations* case the Court again stated that under normal circumstances the policy of 49 U.S.C. 11344(c) should be carried through into licensing. But the Court did not endorse the wisdom of that follow-through, saying simply that the transportation legislation required it and "the pardoning power" belonged to Congress.

Thus, there are two quite significant points that should be emphasized in considering the precedential value of these cases. The first is that the Court, even under the old national transportation policy, was satisfied to permit departures in the licensing area when circumstances warranted. Second, the Court's interpretation is based on the statute as then written. In the two decades since, circum-

stances and the transportation legislation have changed markedly. Indeed, when the relative competitive strengths of the rail and motor sectors are considered along with the competitively-oriented amendments to the national transportation policy and the Interstate Commerce Act, a reevaluation of the special circumstances doctrine hardly seems a departure from judicial expectation. The departure would be continued adherence to the superficial requirements of the *ATA* cases, when their underlying mandate, that the Commission read the act as a whole, leads to the conclusion that the artificial separation of these two modes makes no sense.[3]

Finally, as the Fifth Circuit recently confirmed, the special circumstances doctrine is an agency "created and transformed" doctrine, *American Trucking Assns, Inc.* v. *ICC*, 682 F. 2d 487, 492 (5th Cir. 1982). As such, it is not an immutable doctrine, but one that must change with the changing realities of the economy and the industries regulated by the Commission. Those realities have changed, and we are changing our policy to reflect this.

The relationship between rail-motor acquisition provisions and licensing provisions of the revised Interstate Commerce Act require the abolition of the "special circumstances" doctrine

The strong endorsement of competition embodied in the amendments to the Interstate Commerce Act has altered dramatically the relationship between the Commission's restrictive interpretation of rail-motor acquisition provisions in 49 U.S.C. 11344(c) and the motor carrier licensing provisions of 49 U.S.C. 10922 and 10923. Prior to the passage of the MCA, restrictive motor carrier entry

---

[3] While the statutory language in section 11344(c) remains unchanged, rail-motor acquisition policy gets its content both from the legislation and interpretation. We will shortly issue a proposed policy statement to reexamine our interpretation of this provision in the light of the Motor Carrier Act and the Staggers Rail Act.

policies blurred the distinction between a rail carrier's request for a motor carrier license and a rail carrier's request to acquire motor carrier operations. That is, the Commission's obligation "to apply the Act as a whole" prevented it, in general, from authorizing unrestricted rail-related motor carriage under the licensing provisions which it would not authorize under the rail-motor acquisition provisions. However, this obligation has never dictated identical application of the licensing and acquisition provisions of the act to rail-related carriers. The "special circumstances" doctrine itself and the several exceptions to the stringent application of the doctrine were developed in order to blunt the impact of the restrictive interpretation of the rail-motor acquisition legislation on motor carrier licensing provisions.[4]

Those arguing for maintenance of the "special circumstances" doctrine cite new section 10505(g)(1) of the revised act as support for their position. Section 10505 generally places broad authority in the Commission to exempt from regulation rail transportation in situations where the Commission finds that regulation is not needed to prevent abuses of market power, regardless of the

---

[4] Over the years, the Commission has carved out several exceptions to the strict "compelling necessity" standard of the "special circumstances" doctrine. These exceptions have allowed rail affiliates to obtain motor carrier authority unencumbered by incidental-to-rail restrictions in proceedings where: (1) there is little opposition (see *New York Central Transport Co. Ext.—Oakbrook, Ill.*, 99 M.C.C. 94 (1965)); (2) loss of the involved traffic from the affiliated rail carrier is so great that the existence of rail service is threatened (*see H. C. Gabler, Inc., Ext.—Cement from Md. and Pa. Counties*, 86 M.C.C. 447 (1961)); (3) the applicant proposes a unique and innovative service (see *Railway Exp. Agency Inc., Extension—Nashua, N.H.*, 91 M.C.C. 311 (1962)); (4) service for small shippers at small points is shown to be required (see *Santa Fe Trail Transp. Co. Ext.—Colo. & Kans. Points*, 111 M.C.C. 224 (1970); and *Southern Pac. Transp. Ext.—Elimination of Restrictions*, 117 M.C.C. 224 (1972), affirmed *sub nom American Trucking Associations, Inc.* v. *United States*, 373 F. Supp. 252 (W.D. Tex. 1973), affirmed by the Supreme Court at 414 U.S. 1105 (1973)).

presence of effective competition. See H. R. Rept. 1430, *supra*, at 105. Yet subsection (g)(1) of section 10505 specifically excludes from that exemption authority, any power "to authorize intermodal ownership which is otherwise prohibited by this title."

Section 10505(g)(1) does not require the continuation of the "special circumstances" doctrine. First, that section applies solely to an exercise of Commission authority under section 10505, which gives the Commission authority to exempt rail carrier transportation. In this proceeding, we are merely revising a Commission policy regarding motor carrier operating authority applications by rail-affiliated motor carriers. We are not exempting such carriers from their obligation under the statute to apply for motor carrier operating authority under either 49 U.S.C. 10922 or 10923. Second, even if section 10505 (g)(1) could be deemed to express some broader congressional policy, that section prohibits the Commission from "authoriz[ing] intermodal *ownership* that is otherwise prohibited by this title * * * [emphasis supplied]." Our change in policy as expressed in this decision does not authorize prohibited intermodal ownership contrary to that policy. Rather, it permits rail-affiliated motor carriers to expand their operations consistent with the overall congressional policies embodied in the MCA.

The historic interpretation of the acquisition legislation which requires restrictive barriers to rail-related motor carrier operations no longer applies to the procompetitive licensing provisions. We see no proper justification to maintain the "special circumstances" doctrine to coincide with this restrictive interpretation of the acquisition legislation in view of the overriding procompetitive licensing policies of the revised act.[5]

---

[5] As noted the Commission intends to issue a proposed policy statement to reexamine the interpretation of the rail-motor acquisition statutory provision in light of the Motor Carrier Act and the Staggers Rail Act.

Preservation of the inherent advantages of the various modes of transportation is inconsistent with maintenance of the "special circumstances" doctrine under the revised act

The "special circumstances" doctrine has erected barriers against rail incursions into motor carrier markets except upon a demonstration of compelling necessity. Restricting rail-related motor carrier operations to those incidental to rail, it was felt, was necessary to prevent rail domination of motor carriage and ultimately the demise of responsive motor carrier operations along with their inherently flexible service aspects.

However, we are convinced that elimination of the "special circumstances" doctrine is required not only because its stringent limitations on unrestricted rail-affiliated motor carrier competition are inconsistent with the overall procompetitive thrust of the amended act's licensing provisions, but also because the inherent advantages of each mode of transportation are best preserved by increased competition among carriers as endorsed by the revised act.

In the past, the Commission found that the inherent advantages of rail and motor transportation were best preserved by erecting barriers to unrestricted motor carrier operations by rail affiliated motor carriers. We conclude that this is no longer the case. Increased competition endorsed by the revised act produces operating efficiencies and more responsive and innovative services. It sharpens the inherent advantages of each transportation mode. For example, permitting rail-affiliate motor carriers to offer a full range of motor carrier services, rather than only service limited to auxiliary-to-rail service, enhances the carrier's ability to compete with other, unaffiliated motor carriers. The continuation of a policy of imposing auxiliary-to-rail restrictions encumbers the inherent advantages of the motor carrier. Clearly, the

strong endorsement of competition between and among carriers and overall reduced regulatory control expressed in the MCA and Staggers Act are incompatible with the method of preserving the inherent advantages of each mode of transportation under the "special circumstances" doctrine by inhibiting rail-affiliated motor operations.

The policy embodied in the "special circumstances" doctrine of imposing auxiliary-to-rail restrictions upon motor carrier authority, albeit motor authority issued to a railroad or rail affiliate, is entirely contrary to the congressional mandate for more efficient, less restricted operating authority expressly embodied in the MCA at 49 U.S.C. 10922(h). See H.R. Rept. 1069 *supra*, at pp. 17-18. Moreover, in *Removal of Restrictions, Motor Car. of Property*, 132 M.C.C. 374 (1980), the Commission found that inefficient operating restrictions similar to those which define auxiliary-to-rail service were inconsistent with the licensing provisions of the MCA and the Commission's established procedures pursuant to 49 U.S.C. 10922(h) for their removal from existing authorities. See the restriction Removal Rules at 49 CFR Part 1165.[6] While the *Removal of Restrictions* decision deferred judgment concerning the validity of auxiliary-to-rail restrictions because of the statutory basis for their imposition in acquisition proceedings (*supra*, at p. 394), nevertheless the general findings in that decision are instructive in our decision to eliminate the "special circumstances" doctrine with its attendant policy of imposing these restrictions.

Auxiliary-to-rail restrictions are incompatible with the revised act's mandate for efficient motor carrier operations authorized under sections 10922 and 10923. See H.R. Rept. 1069, *supra*, at pp. 17-18. See also section

---

[6] Former 49 CFR Part 1137 has been redesignated as part 1165 in Ex Parte No. 55 (Sub-No. 55), *Revision and Redesignation of The Rules of Practice*, 47 F.R. 49534 (1982).

10922(b)(i)(B)(v) which mandates removal of restrictions contrary to the public interest; No. MC-78786 (Sub. No. 268), *Pacific Motor Trucking Co. Ext. of Common Carrier Operations* (not printed), served April 19, 1981, (restrictions were removed because the public interest no longer required them). The rail bill of lading and the prior or subsequent rail movement restrictions prevent flexible interlining abilities and a comprehensive common carrier service to the general public and complete contract carrier service to contract shippers. The restriction of service to points on rail lines and exclusion of service at "key points" on the line produces fragmented operations which waste fuel resources. Moreover, the restriction which enables the Commission to modify agreements between railroads and their affiliated motor carriers is, we believe, inconsistent with the Staggers Act's mandate for minimized Federal control of the rail transportation system. In short, motor carrier operations which are limited by auxiliary-to-rail restrictions are simply incompatible with the revised act's conception of what responsive motor carriage should be.

Moreover, among the major objectives of both the MCA and the Staggers Act is the promotion of intermodal transportation. Specifically, the MCA amends the national transportation policy expressing Congress' intent "to promote competitive and efficient transportation services in order to * * * promote intermodal transportation." 49 U.S.C. 10101(a)(7)(H). Moreover, section 213 of the Staggers Act codified at 49 U.S.C. 10505(f) grants specific authority to the Commission to exempt from regulation transportation provided by a rail carrier as part of a continuous intermodal movement.[7]

---

[7] In *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 731 (1981), affirmed in part *sub nom. American Trucking Ass'ns, Inc.* v. *ICC*, 656 F.2d 1115 (5th Cir. 1981), the Commission exempted rail and truck service provided by rail carriers in connection with TOFC and COFC service (in trucks that are owned and operated by the railroad itself). In Ex Parte No. 230 (Sub-No. 6), *Improve-*

Clearly, these are further expressions on the part of Congress that rail-motor competition and coordination are the best methods of preserving the inherent advantages of these modes of transportation.

Consequently, the probable imposition of auxiliary-to-rail restrictions under the "special circumstances" doctrine could not help but dampen enthusiasm for the development of intermodal operations. Railroad-affiliated comments argue persuasively that these restrictions prevent their provision of comprehensive intermodal service to their customers. Variance from these restrictions could formerly be had only after an extensive evidentiary hearing and a showing of "special circumstances." In addition, the Commission has in the past exercised its reserved jurisdiction to retroactively impose additional restrictions on ongoing operations. See *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419 (1950). The "special circumstances" doctrine results not only in unnecessary and inefficient operating restrictions on existing rail-affiliated motor carriage, but also in restrictions on rail carrier planning and strategy, resulting in public harm through the failure of rail carriers to institute what might otherwise be useful intermodal services. Elimination of the "special circumstances" doctrine will reduce this "chilling effect" on rail-motor operations allowing fuller development of the inherent advantages of the various modes of transportation through increased intermodal operations and competition.

Therefore, Commission treatment of rail-related motor carrier authority applications will not include the imposition of auxiliary-to-rail restrictions. Accordingly, in

---

ment of TOFC/COFC Regulation (Railroad—Affiliated Motor Carriers), (not printed), served February 19, 1981, we are considering extending this exemption to rail-affiliated motor carriers and all other motor carriers. Nothing in our findings here should be construed as a prejudgment of the issues concerning rate exemptions for various intermodal services involved in that proceeding.

the future the Commission will treat the motor authority applications of rail-related carriers under the general standards of the revised licensing provisions of 49 U.S.C. 10922 and 10923.

In light of our decision here, restrictive authority obtained in the past by rail carriers in licensing proceedngs will be considered to be within the ambit of the expedited restriction removal procedures at 49 CFR part 1165 for removal of existing auxiliary-to-rail restrictions. An application to remove auxiliary-to-rail restrictions imposed in a licensing proceeding shall contain (1) a reference to this proceeding as the Commission decision which found the restriction inappropriate (See 49 CFR 1655.10(b)(5) and 1165.25(7)), (2) a certification that the authority sought to be broadened was received through a licensing proceeding, and (3) the docket number of the licensing proceeding. Furthermore, because the Commission has continued to impose these restrictions, where appropriate, after the MCA, we will waive the regulation (49 CFR 1165.2) which limits restriction removal filings to certificates and permits issued pursuant to applications filed before December 28, 1980, to allow rail-affiliated carriers to reform authority issued pursuant to applications filed before the effective date of this policy statement.

REGULATORY FLEXIBILITY ANALYSIS

We conclude that this policy statement will have a modest, yet beneficial economic impact upon an unascertainable number of small entities. The elimination of the "special circumstances" doctrine will make it easier for small, rail-related motor carriers to obtain operating authority unencumbered by inefficient and unduly restrictive auxiliary-to-rail restrictions. The comprehensive and flexible motor carrier and rail-motor intermodal operations which this change in policy is likely to produce will provide more responsive and flexible service for small as well as large shippers.

ENERGY AND ENVIRONMENTAL CONSIDERATIONS

This policy statement does not significantly affect the quality of the human environment or conservation of energy resources.

AUTHORITY FOR ACTION

This statement is issued pursuant to 49 U.S.C. 10101, 10101a, 10922, 10923, and 5 U.S.C. 553.

INDEX

The subjects involved in this policy statement are:

Motor Carriers

Railroads

Intermodal Transportation

COMMISSIONER ANDRE, joined by COMMISSIONER STERRETT, concurring:

I concur in the issuance of this policy statement. It marks a long overdue change in the Commission's attitude toward intermodal licensing. The only reservation that I have is that the statement does not announce a change in intermodal acquisition policy. As it now stands the Commission has cleared the way for interested railroads to expand into general trucking. But the method of expansion has been restricted to new operations under new authorities. The alternative of expansion through the acquisition of an existing trucking company remains largely foreclosed. The foreclosure is not based on any judgment about the relative impact on the public interest of new entry as opposed to acquisition. As far as I can discern, the foreclosure is caused by the fact that acquisitions are governed by a specific section of the Interstate Commerce Act. Because additional legal issues are raised, acquisitions are to be treated separately at some future time.

I think the separation of these investment alternatives is unwise. The Commission and the courts have long treated licensing and acquisition policies as if they were necessarily related. Continued reconciliation of these policies is required to avoid the charge that the Commission has arbitrarily reversed itself. Moreover, the choice between one type of entry and the next is not one that the Commission should make unless commanded to do so by law. There is no way of predicting the extent of commercial interest in integrated intermodal operation, but to the extent that there is some pent-up demand it has now been channeled into the formation of new operations which must compete with existing firms to gain market share. Maybe that is all to the good, but in the current slumping market there is the equally plausible argument that buying a struggling firm will be less expensive and no less effective. The latter course may also be less disruptive of existing labor and investor relationships. But in any case it is a judgment that the market is better suited to make correctly, since the Commission's deliberations center on the niceties of the law rather than the dictates of commercial efficiency.

Of course, if the Interstate Commerce Act forbids expansion through acquisition, then the best course is to proceed in the licensing area, as we have done, and hope for approval from the appellate courts. The law does not require that result however, or at least I do not read it to do so. A more detailed presentation will, I hope, make it very clear why a change in both licensing and acquisition policy is the natural outcome of recent commercial and legislative developments.

A railroad cannot lawfully acquire a regulated motor carrier without receiving approval from this Commission. In addition to general standards, the Interstate Commerce Act contains a provision which applies specifically to acquisitions of a motor carrier by a rail carrier.

> When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition.[8]

This provision was designed to give the Commission the power to protect the motor carrier industry from railroad domination. It was considered at the time to be * * *

> important to the welfare and progress of the motor carrier industry that the acquisition of control of the carriers be regulated by the Commission so that the control * * * not get into the hands of other competing forms of transportation, who might use the control as a means *to strangle, curtail, or hinder progress in highway transportation for the benefit of other competing transportation.*[9] [Emphasis supplied.]

Consistent with the legislature's initial views, the Commission has normally declined to approve the acquisition of a motor carrier by a railroad unless it is shown that the motor carrier service will be either "aux-

---

[8] The provision appeared first as section 213 of the Motor Carrier Act of 1935; the Transportation Act of 1940 reincorporated the provision as section 5(2)(b); and, as a result of the codification of the Interstate Commerce Act in 1978, section 5(2)(b) became section 11344. In the 1935 version rail carriers had to demonstrate that their applications would "promote the public interest"; this burden was relaxed to "consistent with the public interest" in the 1940 act. The provision is now found in 49 U.S.C. 11344(c).

[9] 79 Congressional Record 12685, July 31, 1935.

iliary to or supplemental of" the acquiring carrier's rail service.[10] The Commission believed that it would not be conducive to * * *

> future healthful competition between rail and truck service * * * to give the railroads free opportunity to go into the kind of truck service which is strictly competitive * * * rather than auxiliary to their rail services * * * (because * * * the financial and soliciting resources of the railroads could easily be so used in this field that the development of independent service would be greatly hampered and restricted * * *)[11]

The appellate courts ultimately declared that certain amendments passed in 1940 reflected congressional knowledge of the Commission's restrictive interpretation of rail-motor entry policy and amounted to legislative approval of the Commission's course. The linchpin of this statutory argument for a protective approach to intermodal competition became the statement in 1940 national transportation policy to the effect that the Commission should regulate to preserve the inherent advantages of the differing modes.

Amendments to the Interstate Commerce Act have progressively reflected the profound changes in commercial circumstances that have taken place in the years since 1940. In particular, Congress has eliminated the intermodal protectionism that was once considered a near universal requirement of the national transportation policy. As the full Commission's statement notes, the 1976 Railroad Revitalization and Regulatory Reform Act altered the ICC ratemaking framework to allow sensible

---

[10] See *Pennsylvania Truck Lines, Inc.—Control—Barker M. Frt.*, 1 M.C.C. 101, 111 (1936) and 5 M.C.C. 9, 11 (1937); *Rock Island Motor Transit—Purchase—Spears*, 39 M.C.C. 59, 69.

[11] *Pennsylvania Truck Lines, Inc.—Control—Barker*, *supra*, 1 M.C.C. at 111-12.

price reductions by railroads. Before enactment of the 4R Act, rail rates were typically held far above variable costs to protect what were then thought to be the inherent advantages of competing modes.[12] Congress reserved this approach in 1976 by precluding the Commission from finding a railroad rate unreasonable if it covers the variable cost of carrying the Traffic. No otherwise rational rate of a railroad can now be denied simply to protect the markets of another mode.[13]

In effect the 4R Act eliminated the "inherent advantages" argument from railroad ratemaking. This development is not only a sensible one, but one with important implications for entry and acquisition policy as well. The courts and the Commission have consistently emphasized that the act must be read as a whole, meaning that some consistency should be sought in policy interpretation. Therefore, if the restraints have been taken off price competition, there is at least good reason to suggest that entry policy should not reflect a protectionist cast.

Whatever doubts the foregoing analysis might have met in 1976, the passage of the Motor Carrier Act and the Staggers Rail Act in 1980 confirm the fact that entry protection is no longer the hallmark of public transportation policy. The national transportation policy has been twice amended to elevate competition to the role of principal regulator of price and entry behavior. Specific enactments shift the burden of persuasion to those who seek to impose anticompetitive restrictions on motor licenses, and still other amendments promote intermodal operations. Most of the pertinent sections of the new laws have been examined in the Commission's principal state-

---

[12] See, *American Commercial Lines, Inc.* v. *Louisville & Nashville R. Co.*, 372 U.S. 744 (1963).

[13] See Public Law 94-210, 94th Cong., 2d Sess., sections 202(b) and 205.

ment and there is no need to dwell on them further. The crucial point is that reference to the preservation of inherent modal advantages in the national transportation policy has become far too slim a [r]eed to support a prohibitive entry regime. It is too slim because the overall policy direction of the Interstate Commerce Act has changed markedly, and because technological advances in internal c[o]mbustion, tire manufacture, roadbuilding and the like have been, in retrospect, more than sufficient guarantors of the real advantages of motor freight.

The problem now is whether the more specific provision in section 11344(c) comm[a]nds a split in entry policy, establishing a statutory preference for new licenses over acquisition of existing operations. The Commission has announced its intention to look into the matter, but the announcement is problematical. It gives industry little information as to timing and even less indication as to how the Commission presently views rail-motor acquisitions. What is worse is the possibility that the pendency, or in this case the potential pendency, of a general investigation may foreclose a decision on some application that surfaces in the interim. Industry could be excused if it abandoned the planning of otherwise rational acquisitions because of the government's bias in favor of new licenses—a bias that is the creature of inaction.

To attempt to avoid this interference with investment planning I would like to offer some preliminary thoughts on the proper interpretation of section 11344(c) in the post Staggers Act era. Certainly I cannot speak for the Commission, and even for myself I would like to reserve some room for reconsideration when a case in controversy comes up. Nevertheless, since I believe that section 11344(c) is open to a procompetitive interpretation it is important to make these observations now.

Section 11344(c) requires that rail-related motor acquisitions be examination (beyond the general require-

ments applicable to all acquisition applications) on the issues of whether the railroad can use the motor carrier to public advantage in its operations, and whether the acquisition threatens an unreasonable restraint of trade. The first issue seems to me straightforward up to the point of the phrase "in its operations." Clearly intermodal integration meets the criterion of public advantage. At least Congress thinks so, and has repeatedly so legislated. But would a general motor freight operation that never, or only occasionally exchanged traffic with a rail parent be used to public advantage "in its operations," meaning the operations of the railroad? One can see scholastics lining up to defend the proposition that "in its operations" requires a close physical connection with the running of trains. Admittedly it is just such an interpretation that has governed for decades.[14] But it is not the only satisfactory interpretation, nor even the interpretation that immediately commends itself to someone coming to the subject for the first time.

Obviously the issue is what are "its operations"? In an environment that is increasingly populated by integrated transportation companies the answer would seem to be "in the marketing and delivery of transportation service." Consider the fact that the Staggers Act gave the ICC the explicit authority to exempt intermodal operations provided by rail carriers.[15] The obvious implication is that Congress sees railroad operations as increasingly integrated between truck and rail. Even more to the point is the litigation challenging the Commission's exercise of this exemption authority. The Commission's exemption was formulated so relief from regulation reached not only rail transportation, but transpor-

---

[14] It is not altogether clear whether this interpretation has been applied unfailingly. Cases such as *Burlington Truck Lines, Inc.—Purchase—Pirnie*, 85 M.C.C. 363 (1960) indicate that it has not.

[15] Public Law 96-448, section 213 amending 49 U.S.C. 10505.

tation provided by truck owned by the railroads. The trucking industry challenged this extension on literal grounds, arguing that under the statute the transportation had to be "provided by a rail carrier" and truck carriage could not qualify. The reviewing court affirmed the Commission's broader interpretation, stating that the truck portion of intermodal service is transportation provided by a rail carrier, the use of trucks notwithstanding.[16] While there is some roughness in the analogy, it is at least fair to say that the phrase "in its operations" is, as is the phrase "provided by a rail carrier," open to an interpretation that does not bind the freight to trains.[17]

Adopting this broader meaning will not result in reading "in its operations" out of the act. There is no question that the Interstate Commerce Act does require a rail carrier to make beneficial use of a motor carrier if it buys one. This is not a surprising requirement since at the time of the 1935 enactment there was widespread concern that the railroads were inclined to use any available tactic to protect their markets. Buying up a competitor and selling off its assets piecemeal is, in hindsight, no more unlikely than others among the predatory

---

[16] *American Trucking Associations, Inc.* v. *ICC*, 655 F.2d 1115 (5th Cir. 1981).

[17] Before leaving the Staggers exemption section another point is worth addressing by way of anticipation. Admittedly the provision prohibits the use of the exemption power to authorize intermodal ownership that would be unlawful under the terms of section 11344(c). That prohibition does not, however, have any substantive impact on the meaning of section 11344(c), or reflect a congressional commitment to any single interpretation of that section —particularly an unnecessarily restrictionist interpretation that would run counter to the underlying purposes of the new law. As the House stated "This (limitation on the exemption provision) should not, however, be construed as a prohibition of the Commission's authority, to approve intermodal ownership consistent with section 1344." See, *Comm. on Interstate and Foreign Commerce, Report on the Rail Act of 1980*, H.R. Rept. 96-1035, at p. 60, 96th Cong., 2d Sess. (1980).

strategies ascribed to railroads. Reading section 11344(c) to prohibit this kind of conduct preserves its prophylactic purpose, but avoids ascribing to it such scope that it prevents useful and efficient integration between companies that have many overlapping marketing, operational and administrative functions. If such a reading departs from precedent, it is an evolutionary departure which can be supported by many of the same legislative developments that lead to the conclusion that rail-motor licensing policy should be made less restrictive.

As to the requirement that the Commission avoid restraints of trade by denying such applications as threaten them, it might be enough to say that such is Commission policy regarding all motor carrier acquisitions cases.[18] Furthermore, since acquisitions are considered on a case-by-case basis, an adequate record can be developed to determine if any special anticompetitive potential exists. In short, the admonition to avoid restraints of trade, like the requirement of use in operations, can be given a meaningful interpretation without imposing on it the overwhelming restrictiveness that current policy implies.

These remarks have been offered in the hope that they will advance the Commission and the industry to a more rapid conclusion on the issue of rail-motor acquisitions. They are not intended to diminish the importance of the licensing policy statement on which there is unanimous accord. But the Commission's jurisdiction runs beyond licensing to mergers, consolidations, even exit from the marketplace. It is important to keep a coordinated view of these responsibilities to avoid the creation of distorted investment incentives. Market entry through the acquisition of an existing firm can be the fastest and most effective way of bringing new energy and new ideas into the marketplace. In some instances it may be the only cost-effective way.

---

[18] See, *Red Ball Motor Frt. Inc.—Control and Merger—Spector*, 127 M.C.C. 737 (1980).

I would offer one final observation. I am in complete agreement with the Commission's decision to permit the restriction removal procedures to be used by rail-affiliated motor carriers. Nevertheless, from an agency standpoint, the availability of restriction removal is completely severable from the issue of new licensing through the standard application process. No harm can come from proceeding with the consideration of new applications even if the availability of the restriction removal process cannot be guaranteed.

By the Commission, Chairman Taylor, Vice Chairman Gilliam, Commissioners Sterrett, Andre, Simmons, and Gradison. Commissioner Andre, joined by Commissioner Sterrett, concurred with a separate expression.

AGATHA L. MERGENOVICH,
Secretary.

[SEAL]

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 81-4389, 83-4039

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners.

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

Jan. 20, 1984

Petitions for Review of Orders of the
Interstate Commerce Commission

Before GARZA, WILLIAMS and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

I

In these two consolidated cases, we consider whether the Interstate Commerce Act, as revised by the Motor Carrier Act of 1980 and the Staggers Rail Act of 1980, requires the Interstate Commerce Commission to adhere to its longstanding policy in motor carrier licensing proceedings of generally restricting rail-affiliated motor carriers to operations "auxiliary to or supplemental of" the rail operations of the company, unless the particular rail-affiliated trucking company can demonstrate "special circumstances" that justify an exception to the general rule.

We conclude that the revised I.C.A. does not require this singling-out of rail-affiliated motor carriers for especially restrictive treatment in licensing proceedings. We deny the petition to review the Commission's decision to abrogate the old "auxiliary to or supplemental of" general rule and its "special circumstances" exception in licensing proceedings under 49 U.S.C. § 10322. See Ex Parte No. MC-156, *Applications for Motor Carrier Operating Authority by Railroads and Rail Affiliates*, 132 M.C.C. 978 (1982) (C.I. 22). It follows that we deny the petition to review the Commission's granting of unrestricted motor carrier operating authority to Pacific Motor Trucking Company, a rail-affiliated motor carrier, without a finding of "special circumstances." See MC-78786 (Sub-No. 281) F, *Pacific Motor Trucking Company Extension—Nationwide General Commodities* (unpublished).

PMT, a wholly-owned subsidiary of Southern Pacific Transportation Company, a rail carrier, applied for nationwide operating authority for its trucking business. An I.C.C. Review Board granted PMT's application and the Commission confirmed without a finding of special circumstances that would justify the broad grant of operating authority beyond auxiliary-to-rail service. One of the petitions before us to review and set aside the Commission's order followed. During the pendency of our review, the Commission began to reexamine the validity of the special circumstances doctrine in light of the 1980 amendments to the I.C.A. A panel of this court heard PMT's petition, but, citing the doctrine of primary jurisdiction, stayed proceedings until the Commission ruled. *American Trucking Associations, Inc. v. I.C.C.*, 682 F.2d 487 (5th Cir. 1982). The Commission decided that a rail-affiliated trucking company no longer needs to prove special circumstances to justify an unrestricted grant of authority, and the other petition before us followed. ATA accepts that we ought to uphold PMT's grant if we uphold the Commission's decision to no longer apply the special circumstances doctrine in licensing proceedings.

Therefore the only issue before us is whether the I.C.A. requires application of the special circumstances doctrine in all licensing proceedings.

II

Before the Motor Carrier Act of 1935, the trucking

> industry was unstable economically, dominated by ease of competitive entry and a fluid rate picture. And as a result, it became overcrowded with small economic units which proved unable to satisfy even the most minimal standards of safety or financial responsibility. So Congress felt compelled to require authorization for all interstate operations to preserve the motor transportation system from over-competition . . . .

American Trucking Assns. v. United States, 344 U.S. 298, 73 S.Ct. 307, 97 L.Ed. 337 (1953). Congress in 1935 responded by raising barriers to expansion or entry in the trucking industry. The 1935 Act authorized the Commission to issue a certificate of public convenience and necessity to a qualified carrier

> if it is found that the applicant is fit, willing and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules and regulations of the Commission thereunder, and that the proposed service . . . will be required by the present or future public convenience and necessity.

Pub. L. No. 74-255, § 207(a), 49 Stat. 551-52 (1935). In *Pan-American Bus Lines* the I.C.C. developed the measures for granting a certificate:

> whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant with a new operation or

> service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.

1 M.C.C. 190, 203 (1936). Under the traditional approach, burdens of proof of eligibility for a certificate fell on the applicant. *See, e.g., John Novak Contract Carrier Application*, 103 M.C.C. 555 (1967). A certificate became a grant of a francise protecting motor carriers from threatening competition. *See* Anderson, Jerman & Constantin, *Railroad versus Motor Carrier Viewpoints on Regulatory Issues*, 45 I.C.C.Prac.J. 294, 302-03 (1978). Inadequacy of existing service was the fundamental inquiry in deciding public convenience and necessity, *see, e.g., Southern Kan. Greyhound Lines, Inc. v. United States*, 134 F.Supp. 502, 509-10 (W.D.Mo. 1955); *Hudson Transit Lines v. United States*, 82 F.Supp. 153, 157 (S.D.N.Y. 1948); an application proposing no transportation services not already available over the lines of existing carriers was ordinarily denied. *See, e.g., Worthen Extension—Cranberries*, 117 M.C.C. 470, 477-78 (1972); *Walter C. Benson Co., Inc., Extension—N.Y., N.J. & Pa.*, 61 M.C.C. 128, 130 (1952). Furthermore, the Commission generally held that a lowering of rates could not be considered in determining whether a proposed service was in the public interest. *Roadway Express, Inc., Extension —Eastern Md. Counties*, 120 M.C.C. 578, 584 (1974); *Southland Produce Co. Contract Carrier Application*, 81 M.C.C. 625, 628 (1959).

Protecting truckers from other truckers was only one part of the regulatory scheme. Protecting motor carriers from railroads rounded out the picture. The Commission stated the anti-railroad rationale in the original decision establishing the general policy in licensing proceedings of imposing auxiliary-to-rail restrictions on rail-affiliated trucking companies:

> [R]ailroad controlled motor carriers might ultimately be able to prevail over independent competi-

> tors, not because of any superiority in service or operation, but through their ability to draw upon the financial and other resources of their parent companies, and . . . the motor-carrier industry is more likely to develop in inherent strength and efficiency if it continues, as in the past, to remain largely in independent hands.

Kansas City S. Transport Co., Inc., Com. Car. Application, 10 M.C.C. 221, 237 (1938).

The statutory footing of the restrictions on rail-affiliated trucking companies was what are now 49 U.S.C. §§ 11344(c), which enacted high barriers to rail companies' *acquisition* of trucking companies, and 10101(a), the National Transportation Policy, containing the statement that one policy was to "recognize and preserve the inherent advantages of each mode of transportation." [1] The language of both continues essentially unchanged into the present Act.

The acquistions section proved to be particularly influential in establishing a policy of protecting trucking from railroads because it explicitly allowed rail carriers acquisition of a motor carrier only if the motor carrier was to operate under auxiliary-to-rail restrictions. In pertinent part, § 11344(c) reads:

> [W]hen a rail carrier, or person controlled by or affiliated with a rail carrier, is an applicant and the transportation involves a motor carrier, the commission may prove and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in

---

[1] The predecessors to § 11344(c) were § 5(2)(b) of the I.C.A. as amended in 1940, and § 213(a) of the Motor Carrier Act of 1935. Section 10101(a)'s predecessors were § 202(a) of the Motor Carrier Act of 1935, and the National Transportation Policy as prefixed to the I.C.A. of 1940, 54 Stat. 899.

its operations, and will not unreasonably restrain competition.

The phrase, "to use service by motor vehicle in its operations," has been read as expressing a congressional intent that railroads were at least generally not to be allowed to acquire trucking companies unless they were to be used in rail-related activities.[2]

The licensing requirements did not explicitly provide for auxiliary-to-rail restrictions, but nearly from the start the Commission read the restraints of the acquisitions section into its licensing policy. *Kansas City S. Transport Co., Inc., Com. Car. Application*, 10 M.C.C. at 237. The Commission interpreted § 11344(c)'s language to mean, not only that railroads could not acquire, but also that they could not generally operate as unrestricted trucking companies. As part of this reading the Commission also pointed to the National Transportation Policy's requirement of preserving "the inherent advantages of each mode," under the logic that, without protection

---

[2] See Commissioner Eastman, Hearings before Subcommittee of the Committee on Interstate Commerce, United States Senate, on S. 3606, 75th Cong., 3d Sess. 23 (1938 hearings to consider amendments to the Motor Carrier Act of 1935):

> The reason for that proviso was that at the time when this act was under consideration by your committee, there was a feeling on the part of many that railroads, for example, ought not be permitted to acquire motor carriers at all. It was pointed out, in opposition to that view, that there were many cases where railroads could use motor vehicles to great advantage in their operations, in substitution for rail service, as many of them are now doing. Many railroad men, for example, feel that the operation of way trains has become obsolete; that the motor vehicle can handle such traffic between small stations much more economically and conveniently than can be done by a way train; and the motor vehicles are being used in that way by many railroads. The same is true of many terminal operations. The motor vehicle is a much more flexible unit than a locomotive switching car, and it can be used to great advantage with great economy in many railroad operations.

against the railroads, the infant trucking industry might not develop to its maximum extent. Railroads objected, but in *I.C.C. v. Parker*, 326 U.S. 60, 65 S.Ct. 1490, 89 L.Ed. 2051 (1945), and later in *United States v. Rock Island Co.*, 340 U.S. 419, 71 S.Ct. 382, 95 L.Ed. 391 (1950), the Supreme Court affirmed the Commission's power to condition a rail-affiliated trucking company's license with auxiliary-to-rail restrictions. In particular, the Court noted that Congress had in 1940 reenacted the "in its operations" language in full knowledge that this language was also being applied in licensing proceedings. *Id.* at 432, 71 S.Ct. at 390. Further, it backed up the Commission's interpretation of the National Transportation Policy, stating that "[c]omplete rail domination was not envisaged as a way to preserve the inherent advantages of each form of transportation." *Id.* at 433, 71 S.Ct. at 390.

The next and predictable chapter in this regulatory history was the Commission's adoption of an exception to its general rule. In *Rock Island Motor Transit Co. Com. Car. Application*, 63 M.C.C. 91 (1954), the Commission first applied the "special circumstances" exception. The Commission held that unrestricted authority could be granted to a rail-affiliated trucking company if the rail-affiliate could prove, (1) the grant would not restrain competition, and, more importantly, (2) the public interest required the proposed service, which already certificated carriers had not offered except where it suited their convenience. *Id.* at 102. Protestants appealed this decision, and in *American Trucking Assns. v. United States*, 355 U.S. 141, 149-50, 78 S.Ct. 165, 170-71, 2 L.Ed.2d 158 (1957), the Supreme Court affirmed the Commission's use of the special circumstances exception, stating:

> Section 207 [the licensing section] . . . makes no reference to the phrase "service . . . in its operations" used in § 5(2)(b) [the acquisitions section], nor is there any language even suggesting a manda-

> tory limitation to service which is auxiliary or supplementary. . . .
>
> The legislative history of the Motor Carrier Act of 1935 gives no indication that § 213(a)(1), the predecessor of § 5(2)(b), was to be considered a limitation on applications under § 207 . . . .
>
> In interpreting § 207, the Commission has accepted the policy of § 5(2)(b) as a guiding light, not as a rigid limitation . . . .
>
> We conclude, therefore, that the Congress did not intend the rigid requirement of § 5(2)(b) to be considered as a limitation on certificates issued under § 207.

Id. at 149, 78 S.Ct. at 170. Despite this language, the Court reaffirmed that the licensing and acquisitions sections are interpretive brothers. The Court concluded:

> We repeat . . . that the underlying policy of § 5(2)(b) must not be divorced from proceedings for new certificates under § 207. Indeed, the Commission must take 'cognizance' of the National Transportation Policy and apply the Act 'as a whole.' But . . . we do not believe that the Commission acts beyond its statutory authority when in the public interest it occasionally departs from the auxiliary and supplementary limitations in a § 207 proceeding.

Id. at 151-52, 78 S.Ct. at 171.

Three years later the Court struck down a perceived Commission deviation from its use of the special circumstances doctrine. In *American Trucking Assns. v. United States*, 364 U.S. 1, 6, 80 S.Ct. 1570, 1574, 4 L.Ed.2d 1527 (1960) (*ATA* II), "[t]he critical issue raised . . . [was] whether the Commission exceeded its statutory authority by granting the permits in question to a railroad subsidiary without imposing more stringent limitations than it did." Finding that "[b]oth the Commission and this

Court have recognized that Congress has expressed a strong general policy against railroad invasion of the motor field," the Court reversed the Commission's grant of unrestricted authority to a rail-affiliated carrier where the Commission had not found sufficient special circumstances to justify the grant. *Id.* The Court noted that "[t]he Commission long ago concluded that the policy of the transportation legislation requires that the standards of [the acquisitions section] be followed as a general rule in other situations, notably in application for common carrier certificates of convenience and necessity." *Id.* The Court further stated that "the policy of opposition to railroad incursions into the field of motor carrier service . . . has not been implemented merely by way of a more or less unguided suspicion of railroad subsidiaries, but rather has evolved through a series of Commission decisions from embryonic form into a set of reasonably firm, concrete standards." *Id.* at 7, 80 S.Ct. at 1574. As in the case before us, it was argued in *ATA* II that changed conditions in the trucking and railroad industries had obviated the need for the presumption against rail-affiliated trucking companies. Nevertheless, the Court said:

> Appellees say these safeguards [erected to prevent railroad domination of trucking] are no longer needed, because independent trucking is no longer an "infant industry." This is an immaterial argument in this forum. We do not condemn the wisdom of the Commission's action. We simply say that the transportation legislation does, and that the pardoning power in this case belongs to Congress.

Id.

III

We may not set aside the Commission's decision unless it exceeds statutory authority or is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Batterton v.*

Francis, 432 U.S. 416, 425-26, 97 S.Ct. 2399, 2406, 53 L.Ed.2d 448 (1977). Even if an agency's interpretation would not be the one we would adopt if looking at a statute completely afresh, we ordinarily accept that agency's interpretation of its own statute if the interpretation "has a reasonable basis in law." *Aberdeen & Rockfish Railroad Co. v. United States*, 682 F.2d 1092, 1096 (5th Cir. 1982), *quoting Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261, 272, 88 S.Ct. 929, 935, 19 L.Ed.2d 1090 (1968).

IV

Petitioners' arguments against the Commission's interpretation are strong. Nevertheless, we are persuaded of the reasonableness of the Commission's position that the new I.C.A., as amended in 1980, permits the abrogation of the special circumstances doctrine in licensing proceedings. We do not say that the new Act requires the Commission to treat rail-affiliated licensing applicants on the same footing as other applicants. We hold that the Commission's decision was permissible as measured by our standard of review.

V

In a point-counter-point process the parties marshal statutory sections to support their arguments. The basic interpretive conflict nonetheless remains straightforward. The Commission relies on Congress' fundamental shift to a deregulatory policy, as embodied in specific changes in the licensing provisions and in additions to the broad policy statements contained in the Act. The Commission points to Congress' new policy of encouraging "intermodal" transportation, and on changed conditions in the motor carrier and rail industries. Petitioners mainly rely on the retention of the acquisitions section in the same form since 1940, and the retention in the National Transportation Policy of the requirement of preserving the inherent advantages of each mode, to support the contention that the Act still embodies the old anti-railroad pol-

icy in licensing proceedings that these two statutory sections have always been interpreted to require.

Petitioners' strongest argument is that repeal of the special circumstances doctrine in licensing proceedings would fall into the category of a "repeal by implication," and that the Commission's touted statutory changes are not enough to meet the stiff burden finding an implied repeal involves. The argument is that the special circumstances doctrine in licensing proceeding was recognized by the Supreme Court to be statutorily required by the acquisitions section and the Nation Transportation Policy, and that the recent changes in the I.C.A. do not constitute an "irreconcilable conflict" necessary to find an implied repeal of the statutory requirement. *See Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 468, 102 S.Ct. 1883, 1890, 72 L.Ed.2d 262 (1983).

This argument has special force because of the broad language quoted above in *ATA* II that "the transportation legislation" required the application of the special circumstances doctrine in that case. Yet the *ATA* II Court was faced not with the Commission's overruling of the special circumstances doctrine in licensing proceedings in general, as here, but rather with only the limited circumstances of the Commission's departure in a single case from its longstanding policy of applying the special circumstances doctrine in licensing proceedings. We cannot find from the Court's opinion its own interpretation that the "in its operations" language of the acquisitions section was in effect also in the licensing section. Scattered phrases in *ATA* II and in the previous Court opinions may be read to indicate that the Court adopted its own interpretation of the I.C.A. as requiring the special circumstances doctrine in licensing. But in no case was the Court's focus clearly on the importance of the distinction between the Court's approval of a Commission interpretation and the Court's adoption of an interpretation themselves. In the face of the Court's clear espousal

of a philosophy of according regulatory agencies maximum flexibility, *see American Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe Railway Co.*, 387 U.S. 397, 416, 87 S.Ct. 1608, 1618, 18 L.Ed.2d 847 (1967), we believe the Court's opinions can most fairly be read as approving the *Commission*'s interpretation of its statute to require that the restrictions of the acquisitions section also be applied in the licensing area, and holding the Commission to this interpretation in all cases in the absence of the Commission's overruling of its policy in general. We do not believe the Supreme Court went as far as to state according to its own interpretation of the I.C.A. that the restrictions of acquisitions proceedings also had to be applied in licensing proceedings.

That the special circumstances doctrine in licensing was not held by the Court to be statutorily required, but rather simply a Court-approved Commission interpretation of its statute, answers petitioners' efforts to require the Commission to demonstrate a repeal by implication. The Commission need not meet the difficult burden of proving that the new I.C.A. provisions present the "irreconcilable conflict" necessary to find a repeal by implication. Instead the Commission must meet the much easier burden necessary to justify a change in a longstanding policy or interpretation by an agency of its statute.

Courts usually accord great weight to longstanding policies and interpretations announced by an agency, closely scrutinizing departure from agency precedent. *See, e.g., NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75, 94 S.Ct. 1757, 1761-62, 40 L.Ed.2d 134 (1974); *Zemel v. Rusk*, 381 U.S. 1, 11-12, 85 S.Ct. 1271, 1278, 14 L.Ed. 2d 179 (1965).[3] On the other hand, as the Court noted

[3] Petitioners argue that, in addition to the normal weight given to longstanding policies and interpretations, the "doctrine of reenactment" should apply. The argument is that Congress' reenact-

in *American Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe Railway Co.*, 387 U.S. 397, 416, 87 S.Ct. 1608, 1618, 18 L.Ed.2d 847 (1967),

> [T]he Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretations and overturn past administrative rulings and practices . . . . Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adopt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

Given these principles and in light of the changes in both the industries involved and the I.C.A., we find reasonable the Commission's interpretation of its statute as allowing abandonment of the special circumstances doctrine in licensing proceedings.

VI

Under the old Act, the focus of the licensing provisions was on protection of already-operating truckers from new competitors. The new Act takes a radically

---

ment of the "in its operations" and "inherent advantages" language after the Commission's establishment of the special circumstances doctrine in licensing proceedings precludes a subsequent change by the Commission. To bring the "doctrine of reenactment" into play, however, Congress must not only be aware of the agency's interpretation, but must give some affirmative indication of its intent to preclude an agency change in interpretation. *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431-32, 75 S.Ct. 473, 476-77, 99 L.Ed. 483 (1955); *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1380 n. 14 (11th Cir. 1983); *Ass'n of Am. R.R. v. I.C.C.*, 564 F.2d 486, 493 (D.C.Cir. 1977). We see no such affirmative indication here.

different, deregulatory approach in its licensing provisions. The new licensing section as applied to motor carriers of property retains only the old "fitness" requirement, and further requires only that the applicant prove that the proposed operations "will serve a useful public purpose, responsive to a public demand or need . . . ." 49 U.S.C.A. § 10922(b)(1)(B) (West Supp. 1983). In effect, this language codifies the first *Pan-American* criterion of useful public purpose and deletes the second and third *Pan-American* criteria of determining whether existing service is sufficient, and whether the proposed service might hurt existing carriers. Further, § 10922 changes the burden of proof in licensing proceedings. It is no longer necessary for the applicant to prove that the proposed operations are consistent with the public convenience and necessity; the burden is now shifted to protestants to prove such operations are "inconsistent with the public convenience and necessity." *Id.* § 10922(b)(1). The statute goes on to direct the Commission not to conclude that the burden on protestants has been satisfied solely by proving "diversion of revenue or traffic from an existing carrier" to be a result of new entry. *Id.* § 10922(b)(2)(B). Furthermore, the House Report specifically disapproved the traditional protectionist philosophy, stating that "increased . . . competition will bring about the most efficient and economical delivery of transportation services to the public." House Comm. on Public Works and Transportation, Report on the Motor Carriage Act of 1980, H.R. Rep. No. 1069, 96th Cong. 2d Sess. 1, 14, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2283, 2296.

Petitioners point out that Congress did not go as far as to *completely* deregulate entry into the trucking business. For example, Congress decided to continue to require individual licensing proceedings, thus overturning the Commission's rulings asserting that the Commission had the power to issue blanket approval of licenses to

whole classes of applicants. *See* Senate Comm. on Commerce, Science and Transportation, Report on the Motor Carrier Reform Act of 1980, S.Rep. No. 641, 96th Cong., 2d Sess. 6; H.R. Rep. No. 1069 at 15, *reprinted in* 1980 U.S.C.C.A.N. at 2297. Furthermore, Congress specifically directed the Commission not to go beyond its statutory mandate in its decisionmaking; *see* Pub.L. No. 96-296, § 3(a), 94 Stat. 79, *reproduced at* 49 U.S.C. § 10101 note; H.R. Rep. No. 1069 at 10-11, *reprinted in* 1980 U.S.C.C.A.N. at 292-93; S.Rep. No. 641 at 23 (1980); 126 Cong. Rec. H 5345 (June 19, 1980); this admonition reflected a concern that the Commission might deregulate more than Congress directed in the revised law. *See* H.R. Rep. No. 1069 at 97, *reprinted in* 1980 U.S.C.C.A.N. at 2333.

Notwithstanding that Congress did not completely deregulate the trucking industry, the 1980 amendments unquestionably embody a strong new deregulatory philosophy. One of its cornerstones is the Motor Carrier Act's eased entry requirements under the licensing provisions, offering "increased opportunities for new carriers to get into the trucking business and for existing carriers to expand their service." H.R. Rep. No. 1069 at 3, 1980 U.S.C.C.A.N. at 2285. Where Congress has lowered barriers to entry into the trucking industry, we are persuaded that the Commission acted reasonably in concluding that Congress did not nonetheless intend that high barriers should be retained for the railroads alone.

Our conclusion is buttressed by the fact that the old policy requiring auxiliary-to-rail restrictions on rail-affiliated trucking companies has never been ironclad; even in acquisitions proceedings where the "in its operations" language explicitly required some sort of auxiliary-to-rail restrictions, railroads could acquire trucking companies with unrestricted operations under special circumstances. *See American Trucking Ass'ns., Inc. v. United States*, 425 F.Supp. 903 (D.D.C. 1975), *aff'd* 425 U.S.

955, 96 S.Ct. 1735, 48 L.Ed.2d 201 (1976). In other words, even under the old protective regulatory scheme there was no automatic, per se exclusion of railroads from unrestricted trucking operations. If there had been such distrust of railroads built into the regulatory policy, the Commission position would be less persuasive. We find it easier than it otherwise would be to affirm the Commission's decision that the exception should now swallow the rule, that "special circumstances" should no longer be so special.

Thus we believe that the Commission was within its authority in abolishing the special circumstances doctrine in licensing proceedings, even if the doctrine survives in acquisitions proceedings. We do not decide whether the "in its operations" language of § 11344(c) may now be given a new meaning. We need not and do not decide the question of whether § 11344(c) still requires the retention of the special circumstances doctrine in acquisition proceedings.[4] Even if § 11344(c) still demands proof of special circumstances in acquisitions proceedings,[5] we are persuaded that under the revised I.C.A. the acquisitions and licensing sections are not required to be interpreted in tandem.

---

[4] In Ex Parte No. 438, *Acquisition of Motor Carriers by Railroads* (August 17, 1983), the Commission announced its new policy of no longer requiring that special circumstances be shown to justify acquisitions by rail carriers of motor carriers whose operations go beyond auxiliary-to-rail operations.

[5] Confining the expansion of railroads into the trucking industry by using the special circumstances doctrine essentially is a response to antitrust concerns, to fears that the railroads would dominate the trucking industry. Arguably entry by acquisition raises more immediate anti-competitive concerns than licensing because acquisitions may increase concentration in the relevant market, as opposed to the internal expansion of licensing, which may decrease concentration, at least in the short term.

VII

We address here petitioners' remaining arguments. They argue that the retention of the requirement in the National Transportation Policy of preserving "the inherent advantages of each mode," which traditionally has buttressed the application of § 11344(c) to licensing proceedings, means that Congress intended to retain the old anti-railroad bias in licensing proceedings. We have already disposed of the argument that under the pre-1980 I.C.A. the "in its operations" and "inherent advantages" provisions mandated the special circumstances doctrine in licensing proceedings. We note further that the broad "inherent advantages" language could be argued to support a pro-railroad position as well as an anti-railroad position. Congress has recognized the change in the relative economic positions of the rail and trucking industries. For example, one House Report notes that earnings by the railroad industry are the lowest of any transportation mode and are insufficient to generate funds for necessary capital improvements. *See* Report of the Committee on Conference on S. 1946, Staggers Rail Act of 1980, H.R. Rep. No. 1430, 96th Cong., 2d Sess. 79 (1980). Congress has further decided that a lowering of entry barriers in the trucking industry would help the trucking industry. It is therefore not without reason to believe that the abolition of the special circumstances doctrine in licensing proceedings might strengthen the trucking industry by improving its competitive environment as well as strengthen the railroads financially—thus preserving "the inherent advantages of each mode." In a real sense a mechanistic continuation of the old approach to preserving the inherent advantages of each in a changing regulatory environment begs the essential question of means.

But, more concretely, another broad policy announced by Congress supports the Commission's action. In both the Motor Carrier Act and the Staggers Rail Act Con-

gress indicated its intention to promote "intermodal" transportation—meaning shipping involving the transfer of goods to and from trucks and railroads. See 49 U.S.C.A. §§ 10101(a)(2)(I), 10505(f) (West Supp. 1983). The Commission argues forcefully that the special circumstances doctrine has a "chilling effect" on intermodal operations, deterring industry executives from planning comprehensive new rail-motor strategies because of the long delays involved in leaping the special circumstances hurdle.

Petitioners cite new sections 10505(g), 10322(b)(2), and 11344(e) to support their position. Section 10505(g) states: "the Commission may not exercise its authority under this section [granting the Commission authority to exempt rail carrier transportation from regulation in certain instances] (1) to authorize intermodal ownership that is otherwise prohibited by this title . . . ." As the Commission noted in its opinion, this provision is inapposite for two reasons. First, the Commission has not proposed to exempt rail-affiliated trucking companies from the requirement of participating in individual licensing proceedings. Second, even if this section could be interpreted to express a broader congressional policy, the policy would be applicable only to acquisitions, not to licensing proceedings that merely permit rail-affiliated trucking companies to expand their operations. *See* 132 M.C.C. at 985-86.

Section 11344(e) expressly requires the Commission to approve an acquisition of a trucking company by a railroad or rail-affiliated carrier under one particular circumstance. The Commission must approve an acquisition made in order to serve shippers located near rail service and motor carrier service incidental to that rail service, where that rail service is provided by a company other than the acquiring company and the services are seriously "impaired." That this section relating only to acquisitions would be unnecessary if the Congress meant

to completely abrogate the old special circumstances doctrine in acquisitions and licensing proceedings does not necessarily mean that Congress intended to retain the entire doctrine. We will not "leap from [this] particular authorization to a pervasive prohibition." *American Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe Railway Co.*, 387 U.S. 397, 411, 87 S.Ct. 1608, 1616, 18 L.Ed.2d 847 (1967). It is difficult to reason from the circumstance that Congress mandated approval of an acquisition on a given set of facts that it did not otherwise leave to the relevant agency the regulatory discretion to grant approvals in other circumstances.

Petitioners further urge that Congress' failure to exempt trailer-on-flatcar (TOFC) transportation from Commission regulation precludes the abolition of the special circumstances doctrine in license proceedings. *See* 126 Cong. Rec. S. 3636 April 15, 1980. Rather than totally exempting proposed TOFC service from licensing requirements, Congress adopted § 10322(b)(2), which requires expedited treatment of TOFC applications. Petitioners' argument again is misconceived because by abolition of the special circumstances doctrine the Commission did not exempt rail-affiliated motor carriers from meeting licensing requirements; rail-affiliated motor carriers must still come to the Commission to obtain operating authority under 49 U.S.C. § 10922, expedited or not.

Finally, petitioners contend that the Commission is wrong about the relative positions of the trucking and rail industries, and that in reality there is a "compelling need for increased protection of the struggling and depressed trucking industry in comparison to the financially stronger and well-capitalized rail industry." The Commission found that "the relative economic positions of today's truck and rail industries as well as the ability of motor carriage to compete successfully with other forms of transportation undercuts the basic protective rationale

for the 'special circumstances' doctrine." 132 M.C.C. at 982. On this fact issue we defer to the Commission.

VIII

Railroads were the bogeymen of an earlier congressional age. Congress has found that fear of them is no longer justified and has decided to allow the economy to operate more freely in the trucking industry. We are persuaded that it is not unreasonable in light of the new I.C.A. for the Commission to allow railroads into the fray on the same grounds as any other competitor. We deny the petition to review the Commission's approval of PMT's application, and deny the petition to review the Commission's abolition of the special circumstances doctrine in licensing proceedings.

Petitions to Review and Set Aside are DENIED.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nos. 81-4389 & 83-4039

ICC MC-78786 (Sub-No. 281) F &
ICC Ex Parte No. MC-156

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

Petitions for Review of Orders of the
Interstate Commerce Commission

Before GARZA, WILLIAMS and HIGGINBOTHAM, Circuit Judges.

JUDGMENT

These causes came on to be heard on the petitions of American Trucking Associations, Inc., et al., for review of orders of the Interstate Commerce Commission, and were argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petitions for review of the orders of the Interstate Commerce Com-

mission in these causes be, and the same are herein, denied;

IT IS FURTHER ORDERED that Petitioners and Petitioner-Intervenor, International Brotherhood of Teamsters, pay to the Respondents and Respondents-Intervenors, Pacific Motor Trucking Company, Inc., et al., the costs on appeal, to be taxed by the Clerk of this Court.

January 20, 1984

Issued as Mandate: Apr. 17, 1984

APPENDIX D

[Service Date Aug. 25, 1981]

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-78786 (Sub-No. 281) F

PACIFIC MOTOR TRUCKING COMPANY EXTENSION—
NATIONWIDE GENERAL COMMODITIES

Decided: August 7, 1981

By decision of February 17, 1981, (served February 25, 1981), Review Board Number 1 granted the above entitled application in its entirety.

On March 17, 1981, appeals for administrative review of this decision were filed by protestants Central Freight Lines, Inc., and Steere Tank Lines, Inc. Applicant filed a reply to these petitions on April 1, 1981.

On March 19, 1981, a petition was filed by American Trucking Association's, Inc. (ATA), for leave to intervene and for administrative review. The petition will be granted. Applicant has filed a timely response to the petition (by separate pleading also dated April 1, 1981) and no party will be prejudiced by our permitting the sought intervention.

Late tendered appeals were also submitted for filing by protestants Bowman Transportation, Inc., (on April 13, 1981, embracing a motion for receipt of the pleading) and Southwestern Motor Transport, Inc., (on April 21, 1981). We will accept the late tendered appeals for filing because protestants have shown good cause for their acceptance; neither pleading raises any new or additional issues (as acknowledged by applicant in a (letter) reply to the Bowman appeal dated April 23, 1981); and no party will be prejudiced as a consequence.

We have considered the record in this proceeding including the appeals and applicant's responsive pleadings. We conclude that each of the appeals should be denied, and that based on the facts of record and applicable law PMT be authorized to provide the service sought and authorized by the review board.[1]

This action does not significantly affect either the quality of the human environment or conservation of energy resources.

It is ordered:

The late tendered appeals filed by protestants Bowman Transportation, Inc., and Southwestern Motor Transport, Inc. are accepted for filing.

The petition for leave to intervene and administrative review filed by American Trucking Associations, Inc., is granted.

The appeals filed by protestants Central Freight Lines, Inc., Steere Tank Lines, Inc., Bowman Transportation, Inc., and Southwestern Motor Transport, Inc., and by intervenor American Trucking Associations, Inc., are denied.

Operations may begin only following the service of a certificate and upon compliance with the following requirements set forth in the Code of Federal Regulations:

---

[1] The arguments raised by the parties on appeal, however, point out clearly the need for us to reexamine the "special circumstance doctrine" as it has been applied to applications involving rail-affiliated motor carriers. This is particularly warranted now in light of the recently enacted Motor Carrier Act of 1980 [Pub. L. No. 96-296] and Staggers Rail Act of 1980 [Pub. L. No. 96-448]. We believe that a proceeding allowing for notice and public comment (as opposed to an adjudication) is the best vehicle for addressing a question of this magnitude. Accordingly, we will issue a proposed policy statement in the near future requesting comments on these matters.

insurance (49 CFR 1943), designation of process agent (49 CFR 1044), and tariffs (49 CFR 1310).

This decision will be effective 15 days from the date of service.

By the Commission, Chairman Taylor, Commissioners Gresham, Clapp, and Gilliam. Commissioners Gresham and Gilliam concurred with separate expressions. Commissioner Clapp concurred in part and dissented in part with a separate expression. Chairman Taylor dissented with a separate expression.

AGATHA L. MERGENOVICH
Secretary

[SEAL]

COMMISSIONER GRESHAM, concurring:

While I would prefer to issue a more comprehensive decision which explains fully the basis for a grant of unrestricted authority, the issuance of a more detailed decision is impossible because a majority of the Commission cannot be achieved to approve what should be included in the decision.

In my opinion, the decision first should explain that we need not decide here whether the special circumstances doctrine should be retained. Because special circumstances have been established on the record in this proceeding, a ruling on the survival or demise of the doctrine is unnecessary to the decision here. Furthermore, and particularly because of the limited public participation in this proceeding, the issue should be resolved in a non-adversary proceeding in which we will seek public comments.

Next, the decision should review the development of the Commission's application and interpretation of the doctrine and exceptions to that doctrine. A review of Commission decisions would show that both the doctrine and exceptions to it have been increasingly and continuously liberalized since their inception.

Finally, the decision should explain why, in this particular case, special circumstances have been established. Among the factors which collectively show that the burden of proof has been met are (1) shippers are encountering difficulties with other carriers and need applicant's service to alleviate their problem; (2) only four carriers have appealed the decision granting unrestricted authority, thus reflecting a lack of significant continuing opposition to that grant; and, (3) there is no reason to believe that this carrier has engaged in anticompetitive conduct in the past or will do so in the future. Further, I believe the decision should find that protestants have failed to meet their burden of proof, which is so clearly

stated in the Motor Carrier Act of 1980, to show inconsistency with the public interest.

COMMISSIONER GILLIAM, concurring:

Although not advocating that the Commission depart from the special circumstances doctrine, it is my opinion that passage of the Motor Carrier Act of 1980 and the Staggers Act caused a significant expansion of the doctrine.

Applicants in this case express a desire to utilize the authority requested to institute a TOFC/COFC movement. Absent a showing of harm on the part of protestants, it is my opinion that the desirability of encouraging intermodalism, as clearly articulated by the Congress in both Acts, should lead the Commission to exercise greater flexibility in this area. I agree with Chairman Taylor and Commissioner Clapp that a policy statement is long overdue.

COMMISSIONER CLAPP, *concurring in part and dissenting in part*:

I agree that applicant has provided sufficient evidence for a restricted authority but for the reasons noted below I believe it has failed to meet its affirmative burden of proving special circumstances.

It is appropriate to note at the outset of these comments that I was the first to call for an extensive reexamination of the special circumstances doctrine under the 1980 Motor Carrier and Staggers Acts and to suggest that this be done with proper notice and comment in a non adversary proceeding. That clearly is needed as the range of opinions in this case attests. Although the Com-

mission has found in recent proceedings [1] that there are strong arguments for retention of the concept,[2] it is necessary to consider its proper role in light of changed circumstances in the industry as well as the significant policy changes which have resulted from Congressional action. Both may well support a more expansive view and the current Commission has unanimously agreed to this fresh analysis. In my opinion, the time to renegotiate this doctrine is in that proceeding—not the instant one. Nor can the issue be ignored by merely denying the appeals.

---

[1] See, for example, No. MC-60012 (Sub-No. 100), *Rio Grande Motor Way, Inc., Extension-Dallas* (not printed, served July 23, 1981; No. MC-139960 (Sub-No. 1), *WPX Freight, System, Inc., Extension-Five Western States* (not printed), served July 22, 1981.

[2] The special circumstances doctrine had its origins in the 1935 Motor Carrier Act and the 1940 Interstate Commerce Act and the relevant policies and statutes have been incorporated into the 1980 Act. (For example, section 213(a) became 5(2)(b) and is now found at 49 U.S.C. 11344(c)). The National Transportation Policy which sought to insure maximum development of the rail and motor carrier industries as coordinate transportation services still requires the Commission to recognize and preserve the inherent advantages of each mode of transportation. 49 U.S.C. 10101(a)(1). Thus the Commission has granted railroad motor carrier affiliates certificates under section 10922 (formerly 207) only when auxiliary to and supplemental of rail services unless special circumstances were present which were sufficient to support a decision not to impose restrictions. This compelling public interest test was discussed at length in two Supreme Court proceedings. *American Trucking Association Inc. v. United States,* 364 U.S.C. (1960) and 355 U.S. 141 (1957). Thus, although one may argue strongly for modifications of the doctrine, as former section 5(2)(b) remains and the National Transportation Policy still contains the "inherent advantages" clause the guiding principles that led to the above court cases still govern. (Indeed it may be argued that section 10505(g)(1) of the Staggers Act specifically reaffirms past policies regarding rail-motor affiliation.)

Here the record is devoid of any attempt to show special circumstances. In fact, applicant has begun and ended its case on the premise that the doctrine has not survived the 1980 Acts—a premise which unfortunately does not coincide with the facts. See Notes 1 and 2. There may well be special circumstances here but it is not the Commission's task to ferret them out. It has been suggested that special circumstances may lie in TOFC/COFC service. But, applicant has requested authority to provide motor carrier authority completely divorced from its parent's rail service. It has also been suggested that special circumstances might be found by the very act of proving a public need. But this is the standard operating rights test and special circumstances must go beyond this. It is an affirmative burden placed on an applicant as part of its prima facie case. *See United States v. Rock Island Motor Transit Co.*, 340 U.S. 419, 428, rehearing denied, 341 U.S. 906 (1951). While it is arguable that the 1980 Motor Carrier Act shifted this burden, in light of the extant statutory language of the National Transportation Policy and former section 5(2)(b) I do not believe we can blithly change this burdent without serious analysis, a view which the General Counsel shares.

Two possible solutions to this proceeding come to mind which strike me as more fair and more legally defensible than that adopted here. We could recognize applicant's error in relying on its assumption that the special circumstances doctrine is dead and allow it to present evidence on this issue—with appropriate responses from protestants. In that situation we would have an adequate record upon which to determine applicant's request. In the alternative, we could find that applicant had simply failed to meet its burden, issue a restricted certificate but note that should any subsequent policy statement change the burden applicant is free to petition for modification.

CHAIRMAN TAYLOR dissenting:

In order to obtain authority, an applicant is required to make a prima facie showing that the service proposed will serve a useful public purpose, responsive to a public demand or need. Shipper support, existing authority, and other forms of evidence can be used to present a prima facie case in normal circumstances.

Here, a motor carrier subsidiary of a railroad is seeking nationwide general commodities authority. Prior to enactment of both the Motor Carrier Act of 1980, Pub. L. No. 96-296 and the Staggers Rail Act of 1980, Pub. L. No. 96-448, in order for a motor carrier subsidiary of a railroad to obtain additional operating rights, it was required to show that the grant of authority has not resulted and probably will not result in the undue restraint of competition, and that the public interest requires the proposed operation, which the authorized independent motor carriers have not furnished, except where it suited their convenience. *American Trucking Associations, Inc. v. United States*, 355 U.S. 141 (1957). This is the special circumstances doctrine.

Regardless of the extent to which the special circumstances doctrine has been modified or liberalized by the recent legislation, applicant must still present a prima facie case showing public need and addressing special circumstances. The evidence of record does not present a prima facie case. For this reason, the application should be denied.

APPENDIX E

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 81-4389

AMERICAN TRUCKING ASSOCIATIONS, INC., SOUTHWESTERN MOTOR TRANSPORT, INC., CENTRAL FREIGHT LINES, INC., STEERE TANK LINES, INC. and BOWMAN TRANSPORTATION, INC.,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

Respondents.

July 29, 1982

Kenneth E. Siegel, Washington, D.C., for American Trucking Associations, Inc.

Leroy Hallman, Dallas, Tex., for Southwestern Motor Transport, Inc.

Maurice F. Bishop, Birmingham, Ala., for Bowman.

Hugh T. Matthews, Dallas, Tex., for Steere.

Laurence H. Schecker, I.C.C., Robert B. Nicholson, Atty., Antitrust Div., Dept. of Justice, Washington, D.C., for respondents.

Raymond J. Salasi, Jr., New Orleans, La., Lloyd M. Roach, Dallas, Tex., John MacDonald Smith, San Francisco, Cal., for intervenor Pacific Motor Trucking.

Petition for Review of An Order of the Interstate Commerce Commission

Before BROWN and RANDALL, Circuit Judges, and DUPLANTIER*, District Judge.

JOHN R. BROWN, Circuit Judge:

Pacific Motor Trucking Company (PMT), a motor common carrier and subsidiary of Southern Pacific Transportation Company (SP), a rail carrier, applied for and received from the Interstate Commerce Commission (ICC) a certificate of public convenience and necessity to transport general commodities nationwide. Five protestants before the ICC have filed an action to review and set aside the decision of the ICC in Docket No. MC-78786 (Sub-No. 281) F, Pacific Motor Trucking Company Extension—Nationwide General Commodities. The principal issue raised in the petition for review is whether the "special circumstances" doctrine as applied to a rail-affiliated motor carrier seeking unrestricted motor carrier operating authority continues unchanged in light of the Motor Carrier Act of 1980. Finding that the issue of "special circumstances" is one properly left initially with the primary jurisdiction of the ICC and one which the ICC is currently considering in an administrative proceeding, Ex Parte No. MC-156, Applications for Motors Carrier Operating Authority by Railroads and Rail Affiliates, 46 Fed.Reg. 50, 423 (Oct. 13, 1981), we stay the proceedings in this Court pending final determination of Ex Parte No. MC-156 and certification of that decision to this Court for consideration and decision by this Court on briefs, argument, or both.

Point of Departure

PMT, a wholly owned subsidiary of Southern Pacific, has operated as both an intermodal carrier, carrying freight in conjunction with its parent railroad, and as an over-the-road truck operator in its own right. In Septem-

---

* District Judge of the Eastern District of Louisiana, sitting by designation.

ber 1980, PMT applied for a certificate for unrestricted nationwide authority, seeking to commence "single responsibility service" by providing intermodal services with railroads other than its affiliate, Southern Pacific, and combining rail and motor carrier operations to provide efficient, fuel-saving alternatives. In support of its application, PMT submitted verified statements from 37 shippers who desired single-line service, generally nationwide. Twenty-eight carriers filed protests in opposition to PMT's application, based on their fear of diversion of traffic if PMT's application was granted. In February 1981, Review Board No. 1 granted PMT's application, finding that PMT was "fit, willing, and able" to perform the service and that "a public need for the proposed service is shown by the evidence in this record." Further, the Review Board determined that the record did not establish any materially adverse effects upon the protestant carriers.[1]

From the Review Board's decision, Steere Tank Lines, Inc., Central Freight Lines, Inc.,[2] Bowman Transporta-

---

[1] The Review Board stated:

> A public need for the proposed service is shown by the evidence in this record. The supporting shippers have a need for applicant's services in addition to those available from protestants and other existing carriers. The record does not establish that a grant of authority here will have a materially adverse effect upon protestants' operations. We cannot find that a complete grant of the authority sought will impair protestants' operations in a manner contrary to the public interest. . . . We conclude that the benefits to be derived by the supporting witnesses and the shipping public in general from the authority sought here outweigh any detriment, real or potential, to the protesting carriers.

Pacific Motor Trucking Co. Extension of Common Carrier Operations, No. MC-78786 (Sub-No. 281) F

[2] After oral argument in this Court, Central Freight moved to withdraw as a petitioner in the review of the Commission's order, which motion was granted.

tion, Inc., and Southwestern Motor Transport, Inc. appealed to the full Commission. The American Trucking Associations, Inc. (ATA) was given leave to intervene. Steere contended that PMT should not have been granted authority to transport commodities in bulk and that the application should have been denied since there was no showing of "special circumstances." In its petition to intervene, ATA also challenged the Board's failure to require or discuss "special circumstances." Finally, Bowman, in its appeal, contended that the grant had been made without required findings and that PMT had failed to establish a prima facie case.

First Stop, the Commission

In August 1981, the Commission, at that time then composed of only four Commissioners,[3] affirmed by an equally divided vote the Review Board's decision, with an opinion which included two concurrences, one concurrence in part and dissent in part, and one dissent. While affirming the grant of authority to PMT, the Commission indicated the necessity of reexamining the "special circumstances" doctrine in light of the Motor Carrier Act of 1980 and the Staggers Rail Act of 1980.[4]

---

[3] At the time of the decision, the Commission consisted of four Commissioners, Chairman Taylor, Commissioner Gilliam, Commissioner Gresham, and Commissioner Clapp. Only two of them presently remain, Chairman Taylor and Commissioner Gilliam. See note, 7, *infra*.

[4] In a footnote to its decision, the Commission stated:

> The arguments raised by the parties on appeal, however, point out clearly the need for us to reexamine the "special circumstance doctrine" as it has been applied to applications involving rail-affiliated motor carriers. This is particularly warranted now in light of the recently enacted Motor Carrier Act of 1980 . . . and Staggers Rail Act of 1980. . . . We believe that a proceeding allowing for notice and public comment (as opposed to an adjudication) is the best vehicle for addressing a question of this magnitude. Accordingly, we will issue a proposed policy statement in the near future requesting comments on these matters.

Commissioner Gresham, concurring in the decision, indicated that a majority of the Commission could not be attained. His position was that the decision need not reach the "special circumstances" doctrine "[b]ecause special circumstances have been established on the record in this proceeding, a ruling on the survival or demise of the doctrine is unnecessary to the decision here." Commissioner Gresham thought that the opinion should include a review of the Commission's decisions reflecting its application and interpretation of the special circumstances doctrine and explaining why special circumstances had been established in this case. Finally, he stated that the protestants had failed to meet their burden of proof "which is so clearly stated in the Motor Carrier Act of 1980, to show inconsistency with the public interest." Commissioner Gilliam, in a concurrence, indicated that while he was not "advocating that the Commission depart from the special circumstances doctrine", he believed that the 1980 statutory changes had "caused a significant expansion of the doctrine." He also stressed the absence of harm to protestants. In a partial concurrence and dissent, Commissioner Clapp found that PMT had provided sufficient evidence for restricted authority but had failed to meet its affirmative burden of proving special circumstances, a burden placed on an applicant as part of its prima facie case. Chairman Taylor, in a dissent, indicated that PMT had failed to present a prima facie case showing public need and addressing special circumstances.

The protestants' subsequent request for a stay of the grant of authority to PMT pending judicial review was denied, again by an equally divided vote, the Commission failing to reach a majority. In October 1981, the Commission filed a Notice of Proposed Policy Statement in Ex Parte No. MC-156 which requested comments on the effect of the recent statutory changes on the "special

circumstances" doctrine.[5] The proceeding is still pending, awaiting further action or orders by the ICC, either on the basis of the "record" so far developed or as expanded by virtue of our expressed interest in the importance of the matter and the considered judgment of the Commission.

A Slight Detour

The underlying issue in this appeal is whether and to what extent the "special circumstances" doctrine remains in effect under the Motor Carrier Act of 1980. If the "special circumstances" doctrine retains a role after the statutory changes, there is the subsidiary question of whether the statutory revisions affect the burden of proof of this issue. The "special circumstances" doctrine derives from section 11344(c) of the Interstate Commerce Act, 49 U.S.C. § 11344(c) and the National Transportation Policy, 49 U.S.C. § 10101. Basically the "special circumstances" doctrine reflects the policy against issuing unrestricted motor carrier operating authority to railroads or their affiliates so as to prevent anticompetitive rail control of the trucking industry. The Motor Carrier Act of 1935 prohibited rail acquisition or a merger with a motor carrier "unless . . . the transaction . . . [would]

---

[5] In requesting comments on the effect of statutory changes on the "special circumstances" doctrine, the Commission stated:

> It is possible that the applicability of the "special circumstances" doctrine to motor carrier operating rights proceedings has been significantly altered or, that the doctrine is no longer applicable to such proceedings at all. It is the Commission's intention to examine the statutory provisions and existing law to determine whether, and to what extent, the "special circumstances" doctrine is still applicable. In recent proceedings before the Commission, we have noticed a great deal of interest in the subject, and, think that public comments would be helpful in formulating our policy. We, invite comment on whether, or to what extent, the doctrine of "special circumstances" should survive recent statutory changes, and the reasoning which supports those views.

promote the public interest by enabling such [rail] carrier . . . to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition." This section was recodified in the Transportation Act of 1940 and eventually formed section 11344(c). The Commission, in granting motor carrier authority to a railroad or rail affiliate, generally restricted the motor operations to those auxiliary or supplemental to rail service.

The "special circumstances" doctrine was formulated to allow the Commission to issue unrestricted motor carrier authority to railroads or rail affiliates where the applicant could meet the additional burden of showing that a grant of unrestricted authority did not result in undue restraint of competition and that the public interest required the proposed operation which was not being furnished by independent motor carriers. Through the years, the Commission has carved out several exceptions to the "special circumstances" doctrine. Although the amended Interstate Commerce Act retains the provisions which form the basis for restricting grants of authority to rail affiliated motor carriers, 49 U.S.C. §§ 10101(a) and 11344(c), 49 U.S.C. § 10922(b) has changed the applicable standards for obtaining a grant of motor common carrier authority, lightening the applicant's burden and placing upon the protestants the burden of showing that the proposed service would be "inconsistent with the public convenience and necessity." Even if the "special circumstances" doctrine survives the recent statutory changes, both the Commission and those appearing before it have questioned whether recent statutory changes at the minimum affect the burden of establishing "special circumstances."

Changing Destinations

The doctrine of primary jurisdiction, far from an abdication of judicial responsibility, allows a court when

faced with an issue which calls into question an area of special expertise of an agency to suspend proceedings pending referral of the issue to the agency for its official position.

> The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. . . . "Primary jurisdiction," . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

United States v. Western Pacific R.R. Co., 352 U.S. 59, 63-64, 77 S.Ct. 161, 165, 1 L.Ed.2d 126, 132 (1956) (citation omitted). In explaining the use of primary jurisdiction in *Far East Conference v. United States*, 342 U.S. 570, 72 S.Ct. 492, 96 L.Ed. 576 (1952), the Supreme Court stated:

> The Court thus applied a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascer-

> taining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

342 U.S. at 574-75, 72 S.Ct. at 494, 96 L.Ed. at 582. The Court also indicated that this technique was originally applied in the context of ICC proceedings.

This Court, following the path established by the Supreme Court, has invoked the principle of primary jurisdiction within a variety of contexts,[6] when faced with "an agency statutorily invested with responsibility for the determination and effectuation of policy within the given field which will be affected or influenced by, or influence, the issue posed for Court determination." *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 243 (5th Cir. 1976). When faced with two roads diverging, one leading through the unmarked forest of judicial guesswork and one leading through the clearing of agency expertise, this Court has preferred to take the less traveled by, that of primary jurisdiction. Although primary jurisdiction provides a temporary refuge from a difficult decision, we carefully examine the question presented to

---

[6] *See Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976); (Brown, C. J., concurring, suggesting the use of primary jurisdiction); *Geisser v. United States*, 513 F.2d 862 (5th Cir. 1975) (analogizing to the use of primary jurisdiction); *Mobil Oil Corp. v. Oil Chemical and Atomic Workers International Union*, 504 F.2d 272 (5th Cir. 1974) (en banc) (Brown, C. J., dissenting for failure to invoke primary jurisdiction), *rev'd*, 426 U.S. 407, 96 S.Ct. 2140, 48 L.Ed.2d 736 (1976); *International Paper Co. v. Federal Power Commission*, 476 F.2d 121 (5th Cir. 1973) (Brown, C. J., concurring); *J. M. Huber Corp. v. Denman*, 367 F.2d 104 (5th Cir. 1966); *Weymouth v. Colorado Interstate Gas Co.*, 367 F.2d 84 (5th Cir. 1966); *Carter v. American Telephone & Telegraph Co.*, 365 F.2d 486 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008, 87 S.Ct. 714, 17 L.Ed.2d 546 (1967); *Agricultural Transportation Association of Texas v. King*, 349 F.2d 873 (5th Cir. 1965); *Louisville & Nashville R. R. v. Knox Homes Corp.*, 343 F.2d 887 (5th Cir. 1965).

us to determine whether the rationale underlying primary jurisdiction applies and whether further determination by the agency will illuminate those issues before us. "What bears continual emphasis is that the Court neither passes off final decision on to another tribunal nor escapes from its ultimate duty to decide. For after the exercise of primary jurisdiction determination by the agency concerned, the case comes back in a suitable way for the Court, as a Court, to act." *Usery*, 531 F.2d at 241.

A significant example of this approach is this Court's action in *Tenneco Oil Co. v. FERC*, 580 F.2d 722 (5th Cir. 1978), in which we (i) stayed an appeal from a District Court and (ii) approved the continuation of a like directed administrative proceeding pending final decision by the F.P.C. and which is now pending before the Fifth Circuit on petition for review of the F.P.C. order and appeal from the District Court.

Next Stop, the Commission

In this case, the ICC's own actions emphasize the need to invoke primary jurisdiction. The doctrine of "special circumstances," created and transformed by the agency itself, is one raising issues of great public policy, the effect of implementation being within the agency's expertise. The ICC, aware of the need for more information, has issued a policy statement and requested comments from those affected by the regulation. Thus the agency is in a better position to evaluate the various factors involved and to inquire in more depth into the issue of "special circumstances." Unlike this Court, working with a limited record, the agency, with its expertise and access to information, can provide a basis for rational decision when this Court again reviews the issue. In this case, the ICC has already initiated administrative proceedings and is well on its way to formulating a policy. Deferring to the ICC's jurisdiction to determine the ef-

fect of statutory revisions on the "special circumstances" doctrine also encourages uniformity. The issue of "special circumstances" has already arisen in several Review Board decisions and is currently pending in some form in three cases before the Tenth Circuit.

In addition to the fact that there is currently pending an administrative proceeding before the ICC, we find this case appropriate for primary jurisdiction since the agency, even in the decision here under review, has not spoken authoritatively on the issue of "special circumstances" as affected by the 1980 statutory revisions. The Commission, at the time composed of only four Commissioners, was unable to reach a consensus itself. Two of the four Commissioners involved in the decision, one concurring and one concurring and dissenting, are no longer with the Commission. The Commission presently has six Commissioners, only two of whom were involved in the decision in this case.[7] The Commission, aware of its expertise and of the implications of the "special circumstances" doctrine in further proceedings has made clear its intention to act. With a fuller complement on board, we doubt that the Commission will end up deadlocked as in the previous decision. Presented with broader information and more viewpoints, the Commission will be able to provide an authoritative interpretation of the underlying issues which takes into consideration the full implications of the issue posed for this Court.

---

[7] At the time of the decision in this case, the Commission consisted of: Chairman Taylor, Vice-Chairman Gilliam, Commissioner Gresham, and Commissioner Clapp. The current Commission members are: Chairman Taylor, whose terms expires December 31, 1983; Vice-Chairman Gilliam, whose term expires December 31, 1982; Commissioner Sterrett, whose term expires December 31, 1987; Commissioner Andre, whose term expires December 31, 1987; Commissioner Simmons III, whose terms expires December 31, 1985; and Commissioner Gradison, whose term expires December 31, 1988.

In light of our determination that the invocation of primary jurisdiction is appropriate in this case, we stay further proceedings in this Court until the ICC has issued ts final order or decision in Ex Parte No. MC-156.[8]

PROCEEDINGS STAYED.

---

[8] On the issuance of the final order of the ICC, the parties without further leave are to file, as desired, briefs pro and con on the correctness, validity, and effects of the order and the appropriate action for this Court to take.

APPENDIX F

The pertinent provisions of the Interstate Commerce Act as amended by the Motor Carrier Act of 1980, P.L. 96-296, 94 Stat. 793, *et seq.* and the Staggers Rail Act of 1980, P.L. 96-448, 94 Stat. 1895 *et seq.* are as follows:

§ 10101. Transportation policy

(a) Except where policy has an impact on rail carriers, in which case the principles of section 10101a of this title shall govern, to ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and in regulating those modes—

(1) to recognize and preserve the inherent advantage of each mode of transportation;

(2) to promote safe, adequate, economical, and efficient transportation;

(3) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;

(4) to encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices;

(5) to cooperate with each State and the officials of each State on transportation matters;

(6) to encourage fair wages and working conditions in the transportation industry; and

(7) with respect to transportation of property by motor carrier, to promote competitive and efficient

transportation services in order to (A) meet the needs of shippers, receivers, and consumers; (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping public; (C) allow the most productive use of equipment and energy resources; (D) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions; (E) provide and maintain service to small communities and small shippers; (F) improve and maintain a sound, safe, and competitive privately-owned motor carrier system; (G) promote greater participation by minorities in the motor carrier system; and (H) promote intermodal transportation.

(b) This subtitle shall be administered and enforced to carry out the policy of this section.

Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1337; Pub.L. 96-296, § 4, July 1, 1980, 94 Stat. 793; Pub.L. 96-448, Title I, § 101(b), Oct. 14, 1980, 94 Stat. 1898.

§ 10101a. Rail transportation policy

In regulating the railroad industry, it is the policy of the United States Government—

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absense of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle;

(10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompenastory rates for rail transportation;

(11) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(12) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination;

(14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and

(15) to encourage and promote energy conservation.

Added Pub.L. 96-448, Title I, § 101(a), Oct. 14, 1980, 84 Stat. 1897.

§ 10505. Authority to exempt rail carrier transportation

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.

(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement.

(g) The Commission may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle. Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1361; Pub.L. 96-448, Title II, § 213, Oct. 14, 1980, 94 Stat. 1912.

§ 10922. Certificates of motor and water common carriers

(a) Except as provided in this section and section 10930(a) of this title, the Interstate Commerce Commission shall issue a certificate to a person authorizing that person to provide transportation subject to the jurisdiction of the Commission under subchapter III of chapter 105 of this title as a water common carrier if the Commission finds that—

(1) the person is fit, willing and able—

(A) to provide the transportation to be authorized by the certificate; and

(B) to comply with this subtitle and regulations of the Commission; and

(2) the transportation to be provided under the certificate is or will be required by the present or future public convenience and necessity.

(b) (1) Except as provided in this section, the Interstate Commerce Commission shall issue a certificate to a person authorizing that person to provide transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title as a motor common carrier of property if the Commission finds—

(A) that the person is fit, willing, and able to provide the transportation to be authorized by the certificate and to comply with this subtitle and regulations of the Commission; and

(B) on the basis of evidence presented by persons supporting the issuance of the certificate, that the service proposed will serve a useful public purpose, responsive to a public demand or need;

unless the Commission finds, on the basis of evidence presented by persons objecting to the issuance of a certificate, that the transportation to be authorized by the certificate is inconsistent with the public convenience and necessity.

(2) In making a finding under paragraph (1) of this subsection, the Commission shall consider and, to the extent applicable, make findings on at least the following:

(A) the transportation policy of section 10101(a) of this title; and

(B) the effect of issuance of the certificate on existing carriers, except that the Commission shall not find diversion of revenue or traffic from an existing carrier to be in and of itself inconsistent with the public convenience and necessity.

* * * *

(h) (1) Not later than 180 days after the date of enactment of this subsection, the Commission shall—

(A) eliminate gateway restrictions and circuitous route limitations imposed upon motor common carriers of property; and

(B) implement, by regulation, procedures to process expeditiously applications of individual motor carriers of property seeking removal of operating restrictions in order to—

(i) reasonably broaden the categories of property authorized by the carrier's certificate or permit;

(ii) authorize transportation or service to intermediate points on the carrier's routes;

(iii) provide round-trip authority where only one-way authority exists;

(iv) eliminate unreasonable or excessively narrow territorial limitations; or

(v) eliminate any other unreasonable restriction that the Commission deems to be wasteful of fuel, inefficient, or contrary to the public interest.

* * * *

(j) A motor common carrier of property may deliver to or receive from a rail carrier a trailer moving in trailer-on-flat-car service at any point on the route of the rail carrier if the motor carrier is authorized to serve the origin and destination points of the traffic.

Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1409; Pub.L. 96-296, §§ 5(a), 6, 34(a), July 1, 1980, 94 Stat. 794, 796, 825; Pub.L. 96-454, § 10(a), Oct. 15, 1980, 94 Stat. 2021.

§ 10923. Permits of motor and water contract carriers and freight forwarders

(a) Except as provided in this section and section 10930 of this title, the Interstate Commerce Commission shall issue a permit to a person authorizing the person to provide transportation subject to the jurisdiction of the Commission under subchapter II or III of chapter 105 of this title as a motor contract carrier or water contract carrier, respectively, or to provide service subject to that jurisdiction under subchapter IV of chapter 105 as a freight forwarder, if the Commission finds that—

(1) the person is fit, willing, and able—

(A) to provide the transportation or service to be authorized by the permit; and

(B) to comply with this subtitle and regulations of the Commission; and

(2) the transportation or service to be provided under the permit is or will be consistent with the public interest and the transportation policy of section 10101 of this title.

* * * *

(e) A motor contract carrier of property may deliver to or receive from a rail carrier a trailer moving in trailer-on-flat-car service at any point on the route of the rail carrier if the motor carrier is authorized to serve the origin and destination points of the traffic.

Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1410; Pub.L. 96-258, § 1(9), June 3, 1980, 94 Stat. 426; Pub.L. 96-296, §§ 10(a)(2), (3), 34(b), July 1, 1980, 94 Stat. 799, 800, 825.

§ 11344. Consolidation, merger, and acquisition of control: general procedure and conditions of approval

* * * *

(c) The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Commission may impose conditions governing the transportation. When the transaction contemplates a guaranty or assumption of payment of dividends or of fixed charges or will result in an increase of total fixed charges, the Commission may approve and authorize the transaction only if it finds that the guaranty, assumption or increase is consistent with the public interest. When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition. When a rail carrier is involved in the transaction, the Commission may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Commission finds their inclusion to be consistent the public interest.

Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1436; Pub.L. 96-448, Title II, § 228(a)-(c), Oct. 14, 1980, 94 Stat. 1931; Pub.L. 97-261 § 21(f), (g), Sept. 20, 1982, 96 Stat. 1123.